United States Court of Appeals

for the Second Circuit

APPENDIX

74-1779

United States Court of Appeals

FOR THE SECOND CIRCUIT

MICHAEL T. ANDERSON,

Plaintiff-Appellee,

—against—

GREAT LAKES DREDGE & DOCK CO.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX

(Volume 2—Pages A516-A997)

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Very well.

[In open court - jury present]

THE COURT: Mr. Cohen, will you please now read the balance of the deposition of Capt. De Graff.

MR. COHEN: Yes, your Honor. From page 44, line 8.

"Q Did you get any statements from any of these crew members?

"A No.

"Q You talked to them about what they knew about the accident?

"A It was guesswork on their part and my part."

On page 61, line 18.

"Q You indicated that after the accident to Mr. Anderson you completed the job of turning the holding wire end for end by operating the tugger winch yourself?

"A Yes.

"Q Did you do that all alone in the cab?

"A Yes.

"Q Was anybody else with you at the time?

"A Not until the wire was already in.

"Q While you were operating the tugger winch was anybody else with you?

"A No.

"Q Where were the other men?

"A On deck, on the scow, outside.

"Q Did you finish the job of operating that winch all by yourself?

"A Yes."

That is the end of it, your Honor.

THE COURT: All right.

MR. DANAHAR: May I just read the last question, your Honor?

THE COURT: Yes.

MR. DANAHAR: "By Mr. Danahar: How much time did you spend on it?

"A I don't even know."

THE COURT: All right. Now, that deposition is finished. What is your next piece of evidence, Mr. Danahar, please?

MR. DANAHAR: Your Honor, I have a deposition to read of the -- another deposition of the defendant to read. That I took of the defendant.

THE COURT: What person on behalf of the defendant?

MR. DANAHAR: The office manager of the Great Lakes Dredge & Dock Company.

THE COURT: Yes, sir. What is his name?

MR. DANAHAR: Joseph Rankin.

THE COURT: All right, ladies and gentlemen of

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the jury, you understand that there was another deposition taken of a Mr. Rankin having some identity with the defendant company, and when was that deposition taken, please.

MR. DANAHAR: December 13, 1973.

THE COURT: Thank you.

MR. DANAHAR: May I have the original deposition, Mr. Cohen?

"Deposition of the defendant by Joseph Rankin taken by the plaintiff before Anna Schmelzer, Notary Public, at 3:30 p.n., Thursday, December 13, 1973 at the offices of Alexander, Ash, Schwar[illegible] & Cohen.

"Appearances: Matthew L. Danahar for the Plaintiff, Alexander, Ash, Schwartz & Cohen by Albert V. Testa for the Defendant.

"It is stipulated by and between counsel to the parties hereto that the sealing and filing of the testimony are waived; that all objection except as to form are reserved until the time of trial; that the witness may sign his testimony before any Notary Public; that one copy of the testimony will be furnished to counsel for the defendant without charge.

"J O S E P H R A N K I N, 38 Third Street, Staten Island, New York, having been first duly sworn, testified as follows:

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"EXAMINATION BY MR. DANAHAR:

"Q Please state your name and address for the record.

"A Joseph Rankin, 38 Third Street, Staten Island, New York, 10306."

Page 6. Unfortunately, your Honor, this deposition does not have the lines indicated on it so I cannot refer to them.

"Q How long have you been office manager?

"A Five years.

"Q Where are you office manager? That is, where do you perform your duties?

"A 2705 Richmond Terrace, Staten Island.

"Q On October 18, 1970 were you office manager?

"A Yes.

"Q Were you working at that address you just gave us on that date?

"A Yes.

"Q So you weren't aboard the dredge then when this accident happened?

"A No, sir.

"Q What are your duties as office manager?

"A Assign crews to tugs, take care of the insurance reports, such as these accident reports that come through, send them to Jersey, prepare requests for expenditures for

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repairs on dredges, and so forth. This would be one of the duties.

"Q If an accident should occur on one of the vessels, is it your responsibility to make an investigation of it?

"A No, sir. Not normally."

MR. COHEN: If your Honor please, may we approach the bench or the side bar?

THE COURT: Yes, sir. With the court reporter.

[At the side bar]

MR. COHEN: There was no need for Mr. Danahar in reading the last answer to read that phrase about taking care of insurance reports. He even had that phrase in his own copy of the deposition taken out by brackets, but he read it. I think I should once again -- he has been injecting into this case enough -- I have to move for a mistrial on that ground. Beyond that, your Honor, if the motion for a mistrial is denied I will advise your Honor that throughout this deposition he has made numerous references by asking questions of the witness about insurance company, insurance company investigators, and so on, and I would like an advance cautionary statement to be made to Mr. Danahar not to go into that area.

THE COURT: What about it, Mr. Danahar?

MR. DANAHAR: May I point out to your Honor that

Mr.Cohen, in reading the plaintiff's deposition the other day, brought out by his own questions and answers about insurance. In reading the plaintiff's deposition yesterday he himself in reading a question and answer brought out this subject of insurance.

MR. COHEN: I didn't bring out any subject that the defendant was covered by insurance. All the plaintiff said was that there wasn't insurance money to pay for his hospitalization, and there is no indication as to whether that is his own personal policy or not.

THE COURT: I have got the picture. Now, what is the purpose of reading this deposition of Mr. Rankin? What does he give that is pertinent to this trial?

MR. DANAHAR: This accident report. He is going to testify that he is the one that put in that information about how the accident happened.

THE COURT: All right, sir. Now you will see to it that the essence of your objection is accomplished without referring to any insurance. Do you understand that?

MR. DANAHAR: Oh, yes.

THE COURT: You understand that?

MR. DANAHAR: Yes, your Honor.

THE COURT: That is a direction of the Court. Mr. Cohen's motion for a mistrial is denied.

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MR. DANAHAR: May I just say something in my own defense?

THE COURT: Yes, sir.

MR. DANAHAR: I purposely did have that marked off --

THE COURT: On page 7.

MR. DANAHAR: [continuing] in my copy, to make sure that I did not read it.

THE COURT: But you just read from the original.

MR. DANAHAR: Unfortunately I read from the oiginal and it did not have it and it came out.

THE COURT: All right, thank you. Thank you, gentlemen.

[In open court]

THE COURT: Off the record.

[Discussion off the record]

THE COURT: All right, go on, counsel.

MR. DANAHAR: "Question: Is it your responsibility to arrange for investigation of it?

"A No, sir.

"Q Is it your responsibility to prepare an accident report?

"A If there is none provided, or it's not completely filled out.

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"MR. DANAHAR: May I have this marked for identification, please?"

And at that point, your Honor, Plaintiff's Exhibt 3 is the exhibit that at that time I asked be marked Plaintiff's Exhibit 1 for Identification.

THE COURT: So you make the statement to us, do you, that at that juncture in the taking of the deposition you were referring to a paper marked before this jury as Plaintiff's Exhibit 3 in Evidence?

MR. DANAHAR: Yes, your Honor.

THE COURT: Which you read about an hour ago.

MR. DANAHAR: Yes, sir.

THE COURT: All right.

MR. DANAHAR: "Referring to Plaintiff's Exhibit 1 marked for Identification, is that the accident report that was prepared in connection with this accident to Mr. Anderson?

"A Yes.

"Q Did you prepare it?

"A No, sir.

"Q Who prepared it?

"A George De Graff.

"Q I notice part of this report is in printing and another part, particularly item 25, is typed in.

"A That's right.

"Q Who supplied the printing part?

"A Well, Mike Anderson supplied the printing part.

"MR. TESTA: When you are talking about the printing part, you mean as distinguished from the typewritten part?

"MR. DANAHAR: Yes.

"MR. TESTA: He wants to know who put this part in here and this part [indicating].

"Q That part that was printed in.

"A De Graff.

"Q In other words, items.

"A Everything with the exception of this.

"Q All the items in there with the exception of item 25 were put in there by De Graff. That is the information was.

"A Yes.

"MR. TESTA: Do you know that of your own knowledge?

"THE WITNESS: That is his writing.

"Q With respect to item 25, who typed in that information?"

THE COURT: Is item 25 what you pointed out when you read to the jury that the question was printed and the answer was typed?

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MR. DANAHAR: That is correct, your Honor.

THE COURT: All right. Now, what did Rankin have to say as to that?

MR. DANAHAR: "Question: With respect to item 25, who typed that information?

"A I did.

"Q And where did you get that information from?

"A Anderson.

"Q And when did you get it?

"A The day after the accident. When he was in.

"Q When he was in where?

"A Doctor's Hospital.

"Q You went over to see him at the hospital?

"A Yes.

"Q You spoke to him about the accident?

"A Right.

"Q And that is what he told you happened to him?

"A Yes.

"Q Did he give you any other information regarding the accident?

"A No, sir.

"Q Did you make a report of your interview with Mr. Anderson to anybody?

"A No. My purpose was to get that information that

we had there. That is all I could get out of it.

"Q My question was, did you make a report to anybody regarding the interview you had with Mr. Anderson?

"A Outside of that, no.

"Q Outside of the information that is contained in item 25?

"A Right.

"Q Didn't you give a statement to somebody?

"A Oh, yes. Sure. At a later date, yes."

There is more to that answer, but I am omitting it pursuant to your Honor's instructions.

THE COURT: Yes.

MR. DANAHAR: "Question: And that was a written statement signed by you?

"A It was a written statement signed by me, yes.

"Q When did you give that statement?

"A Some months later, or some weeks later.

"Q Approximately.

"A A couple of months later.

"Q Coming back to Plaintiff's Exhibit 1 --" which is now Plaintiff's Exhibit 3 in Evidence -- "marked for Identification, is that a report that is made out in the regular course of the business of Great Lakes?

"A Of any accident that happens.

"Q Referring to Plaintiff's Exhibit 1 marked for Identification --" now Plaintiff's Exhibit No.3 in Evidence-- "I think you have testified that the information contained under item 25 is all the information that Mr. Anderson gave you when you visited him in the hospital; is that correct?

"A That's right."

I have no further questions, your Honor.

THE COURT: Do you have anything, Mr. Cohen, in connection with that deposition of Mr. Rankin?

MR. COHEN: Yes, sir. On page 10.

MR. DANAHAR: Your Honor, should he read from the original?

THE COURT: You always should unless you have already compared the copy with the original.

MR. COHEN: There is no change.

THE COURT: So there won't be any trouble later. Just watch it, that's all. That can be done easily.

MR. COHEN: Page 10.

"Q When did you give that statement?

"A Some months later, or some weeks later.

"Q Approximately.

"A A couple of months.

"Q And where was that statement taken?

"A In my office.

"Q Have you seen that statement since?

"A Yes."

MR. DANAHAR: I object to this, your Honor.

THE COURT: What statement are you referring to? Is that what is before this jury as Exhibit No. 3?

MR. COHEN: No, if your Honor please, this is another statement that Mr. Danahar read questions about to the jury. I am reading beyond. I read one or two of the questions he read, I am reading right following that referring to a second statement which was marked as an exhibit for identification on the deposition. I am going to get to that point in a moment.

THE COURT: I see. What is the basis of your objection?

MR. DANAHAR: Your Honor, I just asked him if he gave another statement, and I dropped it at that point.

THE COURT: Yes. You didn't bring out anything with regard to that.

MR. DANAHAR: I brought out nothing about what was in the statement, and I see no reason to --

THE COURT: All right. What do you say, Mr. Cohen?

MR. COHEN: He asked more questions about the statement. The statement was marked for identification on

the deposition, along with the other accident report. All I intend to do is produce that statement which was marked for identification on the deposition so that it be here in court and have it marked for identification here.

THE COURT: You would still press your objection?

MR. DANAHAR: Yes, your Honor.

THE COURT: What you could do on the deposition you may not necessarily do at trial. Let me take a look at the deposition. Let me see what lines you want to read.

MR. COHEN: I would like to read page 11, starting at the very top of the page, your Honor, down to the bottom of the page where that statement was marked as Exhibit No.2 for identification.

THE COURT: Yes, sir. Would you also hand up the proposed paper that you say was marked for identification on the deposition.

MR. COHEN: Yes, sir.

THE COURT: So I can examine it and see what it is that you have in mind.

MR. COHEN: And may I be heard at side bar just a brief moment on this, your Honor, when you have got the --

THE COURT: All right. Come on up.

[At the side bar]

THE COURT: May I ask, Mr. Cohen, what is the

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point you propose to make by reading what you asked to be allowed to read, including the exhibit marked on the deposition for identification as No.2, is that it, for identification? What is it that you are hoping to achieve? What do you want to get across?

MR. COHEN: I believe, your Honor, that the witness has testified on the questions I want to read that he reread his statement before the deposition and used it to help him refresh his recollection and, therefore, I believe under those circumstances, especially since Mr. Danahar is the one who read to this jury the questions that this statement was taken from the witness, I believe the statement will become admissible.

THE COURT: Well, having refreshed his recollection what has Rankin to say? What does he say, Exhibit No.2 marked for identification, having refreshed his recollection from reading his deposition, what point does he make?

MR. COHEN: I think I may be confused, your Honor. He read the statement, he reread the statement before his deposition and used it before the deposition was taken to refresh his memory. As the questions of Mr. Danahar put to him indicate. These are the questions I want to read.

THE COURT: Rankin reread what? Plaintiff's Exhibit No. marked for Identification?

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MR. COHEN: Yes, your Honor.

THE COURT: Plaintiff's Exhibit No.2 marked for Identification.

MR. DANAHAR: Before the deposition.

THE COURT: Before the deposition.

MR. COHEN: And he testified that he refreshed his recollection from it.

THE COURT: All right. Do you still press your objection?

MR. DANAHAR: I press it.

THE COURT: The objection is sustained. I will not allow Mr. Cohen to read what he proposes to read, and I will not allow Exhibit No.2 marked for identification into evidence.

[In open court]

MR. COHEN: May we mark it for identification on the trial, your Honor?

THE COURT: Yes. Mr. Clerk, will you mark the paper that was marked at the deposition Plaintiff's Exhibit No.2 for Identification, will you mark that as defendant's exhibit for identification, please.

xx [Defendant's Exhibit D marked for Identification]

MR. COHEN: I have nothing further, your Honor.

THE COURT: Nothing further. Do you have

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anything further, Mr. Danahar, in connection with the Rankin deposition? Yes or no?

MR. DANAHAR: No, your Honor.

THE COURT: Very well.

The next piece of proof, please.

MR. DANAHAR: I want to offer in evidence at this time, your Honor, copies of the plaintiff's income tax returns.

THE COURT: For what years, so the record will be clear?

MR. DANAHAR: For the 1968, 1969, 1970, 1971 and 1972.

THE COURT: Mr. Cohen, I take it there is no objection.

MR. COHEN: No. It stops at 1972, your Honor. We stayed last night pursuant to your instructions and we have the figures for 1973 and 1974, the first month of 1974. Also I would like --

THE COURT: Mr. Danahar shakes his head in the affirmative, so that is agreeable to you?

MR. DANAHAR: That is agreeable to me, your Honor.

THE COURT: All right. And what he is offering right now includes the year 1972; is that right?

MR. DANAHAR: Yes, your Honor.

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THE COURT: All right. Give it to the Clerk and mark it as one group, Mr.Clerk, one exhibit.

xx [Plaintiff's Exhibit No.4 received in Evidence]

THE COURT: Thank you for your cooperation, gentlemen. That saves a lot of time.

Now, with regard to the year 1973, what have you agreed on?

MR. COHEN: For the year 1973, your Honor, the plaintiff's total income was $13,434.

THE COURT: Is that right, Mr. Danahar?

MR. DANAHAR: That is correct, your Honor. But I would like to just break it down into two parts.

THE COURT: Yes, sir.

MR. DANAHAR: $12,823.22 was for actual wages, and $611 was for vacation pay.

THE COURT: Very well. Is that agreeable, Mr. Cohen?

MR. COHEN: Yes, your Honor. So long as we understand that all the other yearly totals also include some amount for vacation pay.

THE COURT: That is true, too, is it not, Mr. Danahar?

MR. DANAHAR: That is also true.

THE COURT: Now, what about the month in 1974?

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MR. COHEN: In the year 1974, up until February 3rd, so that it would be for all of January up to the 3rd day in February, Mr. Anderson earned $1,447.

THE COURT: Correct, Mr. Danahar?

MR. DANAHAR: I accept Mr. Cohen's statement to that effect, your Honor.

THE COURT: Thank you. That's that. Now, what is the next item of proof?

MR. DANAHAR: I want to put on proof on life expectancy.

THE COURT: You gentlemen work that out, and I will point it out to the jury in the course of my charge, and you can point it out in the course of your summations.

Next.

MR. DANAHAR: I would offer in evidence at this time hospital records.

THE COURT: All right. Without the doctor, or do you want to wait until the doctor gets on the stand? You have got your doctor coming in. By the way, I want him here at 9:30 next Tuesday. Tell him that is a direction of the Court, and if you have to subpoena him, subpoena him. Is that clear? He is due in this courtroom at 9:30 next Tuesday, that is the day after Washington's Birthday.

MR. DANAHAR: Yes, sir.

THE COURT: I think you ought to hold the medical records until he gets on the stand so they will have meaning. That gobbledegook in those reports needs to be interpreted.

MR. DANAHAR: I wasn't even going to do anything with the records, your Honor, except to get them into evidence in order to save time.

THE COURT: No, the usual way is to wait until the doctor says, I have looked at those reports.

MR. DANAHAR: All right, your Honor. And I will call Capt. Ash to the stand, please.

THE COURT: All right. Come right up, please.

W I L L I A M C H E S T E R A S H, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DANAHAR:

Q What is your occupation?

A I am a master mariner and marine consultant.

Q Do you hold any marine licenses?

A Yes, I do.

Q What are those licenses and by whom were they issued?

A I have a license as master all oceans, any tonnage, qualified radar observer, issued by the United States

Coast Guard. It was first issued May 1st, 1939 and renewed every five years and will be 35 years old on May 1st of this year, at which time I expect to renew it again.

Q What is a master?

A This is one who is qualified to command a vessel afloat on any ocean of any tonnage if it is an unlimited license.

Q Is the master also sometimes referred to as the captain?

A Yes, sir.

Q What experience and background do you have in the maritime field?

A I have five years as an unlicensed seaman, able-bodied seaman, quartermaster, ordinary seaman, working on cargo vessels, tankers and passenger ships.

In 1932 I received my first license as a third mate. I worked for the State Steamship Company at Portland, Oregon, in their inter-coastal cargo trade, and their Far East passenger ships until 1940 when I cam ashore here in New York and became an instructor in maritime trades Tech at the Metropolitan Vocational High School, and then became senior teacher of the shipbuilding trades school.

When war was declared, I requested release and went back to sea. I sailed for one voyage, my services were

requested as an instructor in seamanship and navigation at the Merchant Marine Academy at Kings Point.

I was promoted to executive officer and served two of the largest officer candidate schools for the training of Merchant Marine officers. The one in New London, Connecticut and the one at Alameda, California.

A release from active duty because of poor health and went to work for the American Foreign Steamship Corporation at 80 Broad Street, New York, as an assistant port captain. Three months later became port captain, in which I served until February of 1945 when I returned to sea as an active ship master.

After one year, at the termination of the war effort, I came ashore as a marine surveyor and consultant, and also first vice-president of the Masters Mates and Pilots and Officers Association during which period I did independent marine surveys.

In 1950 I returned to sea as a ship master and sailed continuously for the next eight years in world-wide trade on ocean-going cargo vessels for the Clifton Steamship Company.

I came ashore here in New York for the next three years working as a relief officer in the cargo vessels around the port area doing marine surveying, and also the

preparation of ocean-going vessels for seatow that were to be scrapped, over 100 vessels during that three-year period.

In 1961 I went back to sea again. I sailed for one year as a navigating officer with Waterman Steamship Comany, and then went with the Marine Transport Lines as a chief mate for one year, promoted to foreman master where I continued to sail steadily in world-wide trade in both cargo ships until 1968, in July, at which time I retired from active seagoing.

Since then I have been engaged as a consultant, occasional marine surveys and retained by Admiralty attorneys as a consultant and have on occasion been required to testify as I am today, mostly for plaintiffs.

I am an affiliate of the Society of Naval Architects and Marine Engineers since 1944. I am a member of the Institute of Navigation since 1948.

Q Now, in the course of our experience over the years have you had any experience with the handling of winches and wire ropes on vessels?

A A great deal of such experience. Every ship I have ever served in --

THE COURT: We never can improve on "yes." I am telling you a word like that is a stunner. Really, if you people would only remember that. Yes or no. And the other

side has to go do something with it.

A Yes, sir.

Q Will you tell us what our experience has been with winches and with wire ropes?

A Well, every vessel I have ever served in has had either steam winches or electric winches or hydraulic winches of various weights to operate excessive loads, small loads, and many of these steam winches have been used with air compressors and operate under air just the same as they would with steam.

Many of the vessels that I have been in have also been operated, discharged by shore cranes using clamshell buckets. I would say in the last seven years of my service all the bulk cargo ships carrying bulk sugar, bulk grain, bulk coal, bulk sulphur have all been discharged by clamshell buckets, the same type as is used in a dredging operation.

THE COURT: May I interrupt a moment, Capt. Ash? You have been in the court the greater part of the trial so far, have you not?

THE WITNESS: Yes, your Honor.

THE COURT: You have heard the description given by various witnesses with regard to the dredge with which we are concerned in this piece of litigation?

THE WITNESS: Yes, your Honor.

THE COURT: The description with regard to its equipment and the bucket and all the rest of that, is that what you are referring to in that description that you gave of your own experiences in that field?

THE WITNESS: Yes, your Honor.

THE COURT: All right.

BY MR. DANAHAR:

Q In connection with winches, is it important to see to it that the wire on the winches is kept safe in the normal workable condition at all times?

MR. COHEN: I object to the form of the question, if your Honor please.

THE COURT: Yes, it is too general. Objection sustained.

Q When it comes time to wind the wire around the drum of a winch, what is the procedure in doing that?

MR. COHEN: May we identify the type of vessel we are talking about, your Honor?

THE COURT: Yes. Please do, and the type of winch that we are talking about.

Q Are you familiar with the tugger winch that had been talked about in this trial?

A Yes.

Q Have you seen winches of that type in your

experience?

A Yes.

Q What is another name for them that you know them by?

A Utility winch, a donkey winch, a general purpose winch.

THE COURT: Now your question.

Q Now, in winding a cable around a winch such as a tugger winch, what is important in connection with the initial starting of winding the cable around the drum of the winch?

A It's important that the wire be spooled on the winch in even rows so that when it gets to the end of the row and it starts to come back again it will go between two so as not to crush or smash the wire underneath, to flatten it or to distort the strands, and also that it shouldn't pileup on one side so that when you do start to discharge it if there is a weight on it that it will suddenly drop down a few inches, because it hasn't been evenly wound, it will slip off.

So that for the safety and prevention of jerking of the load, for the safety of the wire itself, so that it shouldn't become kinked or distorted, it is important that it be wound regularly on the drum.

Q Now, are there devices, or, were there devices back in 1970 on winches that would accomplish this purpose that you have mentioned of winding evenly around the winch?

MR. COHEN: Objection, if your Honor please. I am sorry, I thought you finished.

MR. DANAHAR: I am not finished with the question.

THE COURT: You are talking about the tugger winch. You had better say so. Because that would include, your question would include winches 500 times as large. I don't know. You had better keep on sticking to the terminology that we have become accustomed to.

All right, would you reframe your question.

MR. DANAHAR: Yes, your Honor.

Q Are there devices, or, were there devices in 1970, in October of 1970, that could have been placed on the tugger winch of this type in order to see to it that when the wire was wound around the drum or spool, as you called it, it would wind around evenly?

THE COURT: Hold it.

MR. COHEN: I object to that, if your Honor please. Whether there may or may not have been such devices is immaterial to the issues in this case.

THE COURT: I should think so. The only question really here is,plainly speaking,whether or not,at the time

that the plaintiff undertook to operate in the fashion that he had declared, the primary issue is whether or not just one person could have undertaken that assignment and fulfilled it, or whether it was requisite to have more persons. I don't see its value. The objection is sustained.

Q Captain, when a man is assigned to operate a winch, or in this case a man was assigned to operate a tugger winch, what in your opinion would his duties be in connection with the tugger winch?

MR. COHEN: I have to object to that, if your Honor please.

THE COURT: That is too general. Will you tell us what you have in mind? I don't quite get what you mean. What does "duties" mean? Duties with respect to what? To winding?

MR. DANAHAR: All right.

Q In connection with the tugger winch that we have been talking about --

THE COURT: In 1970.

Q [continuing] in 1970, and when it comes time operate that winch and to start winding a wire cable around it, how many men should be assigned to that operation? In your opinion, based upon your experience.

MR. COHEN: If your Honor please, I don't believe

I heard any testimony by the Captain that he has served or worked aboard dredges, or was familiar with the kind of operation that goes on there.

If he has, then perhaps he is qualified to give an opinion, but without such a foundation I think this question might be improper.

THE COURT: The objection is sustained. Definitely the Captain's experience along the lines suggested by Mr. Cohen.

Q Captain, have you worked aboard vessels where they used winches similar to this tugger winch type involved in this matter?

A Yes, sir.

THE COURT: Will you expand on that a bit, Captain? Will you now please expand?

THE WITNESS: Yes, sir.

THE COURT: What have you done so as to show us that you have had that type of experience?

THE WITNESS: I have operated the winches myself as a seaman, both in hoisting and lowering loads. Both in pulling loads along the deck, or in mooring a ship and heaving on heavy ropes and heavy wires to tie the ship up.

As an officer I have supervised seamen doing the same work. As a master I have been in charge of the officers

and seamen who have been operating these winches of every weight and size conceivable.

THE COURT: Including the type of --

THE WITNESS: The type of the --

THE COURT: [continuing] of winch involved in this litigation?

THE WITNESS: Yes, your Honor.

THE COURT: Please say so. In other words, these experiences that you have just called our attention to in your last answer include experiences of similar nature when you were aboard dredges of the type involved in this lawsuit.

THE WITNESS: No, your Honor.

THE COURT: Then make that clear.

THE WITNESS: Yes. I have never worked aboard a dredge. I have worked aboard barges where I have installed winches on barges with a crane on the barge, with a drilling rig on the barge. I have operated those same winches myself and they were very heavy wires and we had seven ton anchors on each wire and double drum winches.

I have operated these winches myself. We have winches on the ship that just raise and lower a boom. They are called self-topping winches. And they are most identical with this small tugger winch. But they are for one express purpose.

We have other winches that just pull derricks from one side to another to another. They are called vain winches, and they are identical with the winches on this dredge. And I have operated those winches. But I have never worked aboard a dredge.

THE COURT: Thank you, sir. Thank you.

Mr. Cohen.

MR. COHEN: Yes, sir. If your Honor please, in view of the witness's admission that he has never worked on a dredge, or been part of a dredge operation as such, I am going to object to questions put to him asking for his opinion about the propriety, or the manner of any such operation.

THE COURT: No, I don't see that, but I will give you an opportunity right now to conduct a voir dire examination to point out the distinction. It seems to me that from what he has said the main thing for the jury to understand is what is involved in operating a winch of the type with which we are dealing, and the fact it is on one place and not on another seems to me offhand to be a matter of small consequence.

However, the Court allows you the opportunity right now to conduct, if you wish, a voir dire examination.

MR. COHEN: I could do nothing more than develop

what your Honor has, that Capt. Ash has never worked aboard a dredge.

THE COURT: That is a good answer. Your objection is overruled.

All right, Mr. Danahar.

BY MR. DANAHAR:

Q Captain, when an individual is assigned to operate a tugger winch, what specific work should he be assigned to do with respect to that particular winch?

MR. COHEN: That is so broad, your Honor, it depends on what kind of an operation is going on, what the conditons are. I don't think that can be answered this way.

THE COURT: It does indeed, Mr. Danahar. You are really summing it up and you have to give the conditions and you have got to give in detail the kind of operation at the time, and so forth, you know. After all, there has even been testimony here with regard to the speed of revolutions at the time. Because of a lack of full strength and full power. All those things, you know.

MR. DANAHAR: You want me to give a hypothetical --

THE COURT: I'm afraid you had better.

Q Captain, I ask you to assume at this time that on October 18, 1970, Mr. Michael Anderson, the plaintiff in this case, who was a deck hand on Dredge No.50, was

assigned the job of going into the cab over the dredge and to operate a tugger winch; and at that particular time the tugger winch was being used to pull up from a scow alongside of the dredge a heavy wire, or a heavy closing wire, up into the dredge, and the method that was being used to pull that wire up into the dredge was that the wire from the tugger winch had been brought down to the deck, it had been taken up through the dredge's derrick and brought down to the deck and was attached to this heavy wire on deck; and then he was assigned to go up into the cab and to start pulling the tugger winch wire, and which eventually would pull up the closing wire up into the cab where it would be attached to the closing wire drum which was immediately behind this tugger winch; that is, about two or three feet behind it.

Now, assuming further, Captain, that there was nobody else assigned to work with him in the cab where he was to operate the tugger winch; I also ask you to assume that from the position that he was in when he would be operating the tugger winch he could not see out on deck, or on the scow next to the dredge;

I also ask you to assume that the only method of signaling the operator of the tugger winch, Mr. Anderson, was by yelling up to him in the cab, and at that time in addition to the operation, the noise created by the operation of the

tugger winch, there was noise from a generator in the cab.

Now, I ask you, assuming all of those facts, do you have an opinion as to whether under those circumstances this was a safe procedure, a safe and proper procedure to assign Mr. Anderson to operate the tugger winch by himself?

MR. COHEN: If your Honor please, I object to that. I think that is a question for the jury to decide. As a matter of fact, for the jury to decide, and it is not the subject of opinion testimony from this witness.

THE COURT: The objection is overruled. The question is, have you an opinion, Captain? Yes or no?

THE WITNESS: Yes.

THE COURT: Next question.

Q What is your opinion?

A My opinion is that in the operation of this tugger winch, as any winch, one man must be assigned to the controls, and the operation of the controls is his exclusive job, that he cannot leave those controls, that he cannot do any other operation. Because if he has to leave it he has no alternative except to stop it, and walk away from it. But, as long as it has to be in operation, one man must stick with those controls in any type of a winch, particularly this tugger winch.

Now, second point is if it needs manual assistance in

reeving the wire on the drum evenly because there is no mechanical assistance, then another man has to do it. That the man who is operating the winch is serving two functions. He is first serving the function of operating the winch in a safer manner and, second of all, he is in a position to stop or reverse it instantly if something happens.

The third situation is if a signalman is required for any reason the operator can stop the winch while the man walked over to hear any signals, or determine whether anything was wrong, or whether the wire was running clear, but under no condition should a -- less than one man be assigned to the exclusive operation of the winch. This is one exclusive operation.

Q Well now, Captain, assuming that on this occasion the tugger winch operator was unable to see out on deck to see what was going on, do you have an opinion as to how many men should have been assigned to the job up in the cab on that day in connection with the operation I described and asked you to assume?

A Yes, I do.

Q What is your opinion?

A My opinion is that there should have been three men; one for the signalman, one for the manual veering of the wire on the drum, and one to operate that winch.

Q When you say one for the manual veering, what do you mean by that?

A Well, to make the wire spool on the winch regularly row by row. If it had to be guided as was described with a pinch bar obviously that's all that that man should do is guide that wire. He shouldn't operate the winch. That's the winch driver's job.

As far as signalman goes, somebody's got to be in an area where they can see or hear signals.

Q Why is it necessary for an operator of the tugger winch to hear and see what's going on, or receive signals?

A There's a big heavy wire in big coils out on the deck. This wire is three times heavier than the tugger wire. The tugger wire is a half inch diameter, this is an inch and a half. It weighs three times as much.

The men out on deck have to keep it clear as it goes off the deck where it's laying up into the shivs up into the blocks until it comes all the way back into the cab.

Now, if it should get hauled up, like one coil get under another, it could pick both the men up and the wire and create a bad situation.

MR. COHEN: If your Honor please, there has been no testimony that any such condition existed.

THE COURT: I know, he is not saying that it does.

He is trying to emphasize why it is essential to have a man to signal, and he is explaining it by giving you an example. He doesn't say that that condition existed at this particular time.

All right, next question. Are you through with your answer, Capt. Ash?

THE WITNESS: Just one sentence.

THE COURT: Please.

A In other words, if the signalman can see that he can stop the winch man, hold it, stop it. If he can't see it, if there's nobody to see it, then a catastrophe could occur.

Q Now I ask you to assume, Captain, that there has been testimony in this case that the tugger -- that in the event that the wire around the --

THE COURT: Please. I am sorry, but you are going to have to make up your mind how you are going to run your question. You started, and then you changed it.

Now, start again, please.

Q I ask you to assume, Captain, that there has been testimony in this case that in the even the wire going around the tugger winch for some reason or other should not wind around the spool, or the drum evenly, then it could be stopped and backed off.

Now, do you have an opinion as to whether that is a safe or proper thing to do under such circumstances?

A Yes, I do.

Q What is your opinion?

A It is emphatically not. It is a very unsafe procedure.

THE COURT: How come?

THE WITNESS: Because if the men outside are clearing the line they may just be putting their hand on it to lead it to a shiv; if it suddenly drops back they could lose their balance, they could be thrown down. This heavy wire could drop on them. If no signal is given to these men, "Stand clear, we are going to backup the winch," then it is most dangerous to backup the winch without letting anybody know.

MR. DANAHAR: I have no further questions, your Honor.

THE COURT: All right.

Ladies and gentlemen of the jury, before I tell you what time to come back, it is undoubtedly going to be at 2:00 o'clock, it is now twenty minutes of 1:00. Gentlemen, you understand it is my plan to have the case go on and as much evidence as possible adduced by both sides before the jury is allowed to leave this courthouse today. The only

remaining problem for me is to get accommodations for the jury in the event they are detained this evening.

I repeat what I said yesterday, you were warned, you were told, you were all put on notice. Be prepared with your proof.

Now, the question is simply this: Can you give me a rough idea how much more proof the plaintiff will adduce? Approximately how long.

MR. DANAHAR: Your Honor, I am going to talk to Mr.Cohen during the noon recess.

THE COURT: All right. So it may take a matter of minutes more; is that right?

MR. DANAHAR: Yes, your Honor.

THE COURT: That is all you will need after you are through with Capt. Ash, the only remaining witness you are going to call is the doctor on Tuesday.

MR. DANAHAR: Depending upon whether I can get together with Mr. Cohen at the noon recess.

THE COURT: I am sure you will be able to work it out.

Mr. Cohen, that means that you will have to be ready with your proof, you understand.

MR. COHEN: Absolutely.

THE COURT: I told you that yesterday and I am

camds 290 Ash -

glad to get your affirmance by the nod of your head so that I don't want any jarring. I don't want to go through all this business and then find that it was all a waste.

Can you see, Mr. Cohen, adducing testimony running into hours today?

MR. COHEN: Judge, I am estimating, and you know a lot depends on cross, but it may be possible to finish by 5:00 o'clock. It just may well be.

THE COURT: Well, that is a pleasant surprise.

MR. COHEN: Your Honor appreciates, of course, that I have a doctor to bring in on Tuesday also.

THE COURT: No, that I didn't know.

MR. COHEN: We had agreed --

THE COURT: Oh, you are right. That was what you took up at the side bar yesterday. Yes.

MR. COHEN: Yes, your Honor.

THE COURT: All right.

Ladies and gentlemen of the jury, if counsel by doing their utmost can get through with what they have to present today by 6:00 o'clock, would that involve a hardship to any one of you? I want you to tell me, because I won't allow it, that's all. I mean, cases are important, but you are important, too. All right?

Then there it is, the ladies and gentlemen of

the jury are willing to do it. See if you can't manage to get all the proof in on both sides today by 6:00 o'clock with the distinct understanding that all that there will be left on Tuesday by way of proof will be the calling of a medical man by each side. Is that understood?

All right, there it is, as long as the record is clear.

Will you announce 2:00 o'clock, Mr. Clerk.

[Luncheon recess]

[Time noted: 12:45 p.m.]

AFTERNOON SESSION

2:00 p.m.

[In open court - jury present]

THE COURT: Capt. Ash, please come back.

W I L L I A M C H E S T E R A S H, resumed:

THE COURT: Cross examine.

MR. COHEN: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. COHEN:

Q Capt. Ash, do you know the dimensions of that tugger winch that is involved in this case?

A Only what I have heard here in court.

Q Yes, sir. What do you recall hearing?

A Twenty-two inch wide drum and about eighteen inch diameter.

Q Now let me show you this photograph in evidence as Plaintiff's Exhibit A-2, with the overlay showing dimensions, and can you read that, the overlay with the measurements on it [handing]?

A Yes.

Q How wide a drum does the overlay with the measurements show?

A Ten inches.

Q Then how far beyond that drum is it to the handle?

A Another twelve inches. Across?

Q Yes. I am only talking about across, Captain.

A Another twelve. That would be twenty-two inches.

Q So the entire width of that winch is twenty-two inches according to this photograph in evidence; is that correct?

A Correct.

Q Now, I have, Captain, measured off twenty-two inches on this table -- if you care to check me feel free --

A I saw you measuring it.

Q All right. From the edge of the table to the back of this table is twenty-two inches. Agreed?

A Right.

Q That is then the entire width of the tugger winch that we have been talking about in this case; is that correct?

A Correct.

Q And part of that width is occupied, ten inches of it, is occupied by the drum that rotates; is that correct?

A Correct.

MR. COHEN: If I may, your Honor, may I use this jury wheel?

THE COURT: Yes, sir.

Q The drum part of that winch that rotates is over on the left-hand side of the winch; is that correct?

A Correct.

Q And the operating handle is over at the right-hand end; is that correct?

A Correct.

Q And the drum part is actuality is ten inches wide according to the photograph; is that correct?

A That is correct.

MR. COHEN: If you want to check this, Mr. Danahar.

Q The measurement of the jury wheel that we are using here for illustrative purposes is approximately seven and a half inches, just this wheel part.

A Yes.

Q So that it is fairly close to the ten inch width of the actual drum; is that right?

A Fairly close.

Q Now, your testimony was that it is important that the handle that operates the winch always be -- you said the man who operates the winch must stick with the control handle; is that right?

A Correct.

Q He shouldn't run away from the winch while it is

going; is that correct?

A Correct.

Q And in a tugger winch of this type and size does it take two hands to hold on to the control handle, or can a man do it with one hand?

A I think he could do it with one hand. If he wasn't occupied doing something else.

Q But one hand is enough to control the handle of a tugger winch of this type and size?

A Yes.

Q Now, I am putting this piece of rope around the jury wheel to represent the line which we understand actually goes around the drum; is that right?

A Correct.

Q And a man who holds the handle of a tugger winch of this type and size is very close to the line that is being spooled onto the drum of the winch, isn't he?

A It depends which side of the line he is on.

Q If he is on the right-hand side of the line, the side where the handle is --

A Then he is very close to it.

Q Very close to the line going on.

A That's right.

Q Now, one of the things that controls how evenly

a line goes onto the drum of a revolving winch is the lead that it takes into that winch; isn't that true?

A Yes. Of course.

Q And it is up to the person who operates the winch to see to it that he has a fairlead going into it; isn't that correct?

A No, sir, it is not correct.

Q Well, when you would go to operate a winch, Captain, wouldn't you check to see that the lead going into it -- and by that will you explain to the jury what the word "lead" means?

A Yes. What you are seeking in any such operation is known as a fairlead, that it should lead fairly to the area that you want it to reach. Now, if you have a fairlead which allows the wire to only come to the middle of your drum, then it's going to windup on top of each other and fall down on one side or the other.

THE COURT: Therefore?

THE WITNESS: It must be guided, either manually or mechanically, so that it will go even across. A ten inch wide drum could only take twenty turns.

Q Of half inch wire?

THE COURT: No, let him finish.

MR. COHEN: Sorry, your Honor.

THE WITNESS: Then it goes on top and comes again and in-between each turn. So a half inch wire, now, if it's going to come out of the middle and lead only in one direction, what you need is something to make it reeve back and forth, and a single fairlead will not do it.

THE COURT: All right.

Q Let me ask you this, Captain: Before a winch operator starts to take in on a winch shouldn't he check to see if he's got a fairlead at the very beginning of the operation?

A Well, obviously, he has to start it right.

Q Thank you. That's all I was asking.

Now, you say that the wire can be guided during the course of taking it in different fashions, either manually or mechanically; is that right?

A Yes, sir.

Q You also made reference in your testimony earlier today to the term "pinch bar"; is that right?

A Yes, sir.

Q And a pinch bar is a metal bar; is that correct?

A It's a specific kind of a bar.

Q Would you describe it, please?

A As it's been described here, it's actually a spanner wrench. It has a wrench like a yoke on one end,

and it's pointed on the other. These are commonly used around dredges and pipelines. And in this case, as it was described by the plaintiff as I listened --

Q I just asked you to please describe what is meant by a pinch bar.

A As I described it, this is what he described as a pinch bar.

Q Thank you. How long is a pinch bar?

A They vary, but I understood from the testimony --

THE COURT: No, no.

A Twenty inches.

THE COURT: Next question.

Q Is the pinch bar used to guide a wire by putting one end of it on the floor and holding the other end with your hand and moving it against the wire?

A It can be done that way.

Q If you use it in that fashion the only thing that comes in contact with the moving wire is the metal bar; is that correct?

A Correct.

Q All right. You said also that you disapproved, if I understood your testimony, of guiding the wire evenly onto the spool by a system that would consist of stopping the winch, backing it off and then stopping it again and

adjusting whatever wire had to be adjusted; is that correct?

A I disapprove of it under the conditions described, yes.

Q The reason for your disapproval, if I understood correctly was that in backing off the winch with no signal to the people working on the scow they might not know what was coming and they might get hurt; is that correct?

A That's correct.

Q Captain, assuming that it became necessary to do something because the turns on the drum were not coming up evenly spaced out as you would like, and assuming that the winch operator stopped the winch -- all right? -- and then walked seven feet over to the door of the cab on the dredge and yelled across the five feet to the men on the scow, "Hey, I'm backing off," and then he then went back to the winch drum and backed off until he could adjust the wire, would that be all right?

MR. DANAHAR: I object to the form of that question, your Honor. It includes facts that I don't think there is any testimony on.

THE COURT: It is quite clear that it includes facts not presented here, but in order to illustrate his point he can give an example.

The objection is overruled. What do you say to

that, Captain?

THE WITNESS: I would say, yes, fifty percent of the time. It would have to be a qualified yes.

Q By the way --

THE COURT: Would you be good enough -- I am sorry to interrupt you, Mr. Cohen -- would you be good enough, Captain, maybe the jury gets it better than I do, that is possible, but what do you mean by that? Explain that.

THE WITNESS: Yes, sir. If the heavy wire was nearly all the way over and he backed it off it would slack down in the bite, and then when he had to jerk it back up again straight, again you might have a problem. If it was in a position where it wouldn't distort the position of the wire, then it would be perfectly all right.

THE COURT: Now I have got it.

Next question.

Q You were here, I believe you told his Honor, you were here during the course of the trial, were you not?

A Practically all of it.

Q Did you get from any of the testimony you heard the relationship of the scow to the dredge?

MR. DANAHAR: I object to that, your Honor.

THE COURT: The relationship --

MR. DANAHAR: I object to any question dealing

with what the Captain might have heard in the courtroom.

THE COURT: I don't know what he is going to ask. He asked, did you hear testimony as to the relationship of the scow to the dredge. That is all he asked.

MR. DANAHAR: All right.

THE COURT: Did you hear the testimony?

THE WITNESS: Yes, sir.

THE COURT: That is all he was asked.

Q And the scow was tied up to the port side, which is the left side, of the dredge; is that correct?

A Yes, sir. Approximately bow to bow.

Q Approximately bow to bow.

A That's what I heard.

Q Right. And did you hear at about what height in the water the scow would be?

A There was nothing definite I heard. There were conjectures. It could have been seven feet --

THE COURT: No, not what it could have been. You have answered it.

Next question.

Q The door on the cab where the tugger winch was located was over on the port, or left-hand side of that cab; is that correct?

A Correct.

Q And outside that door would be the scow; is that correct?

A Yes.

Q And with two men working on the scow if it became necessary for any communication or instruction to be given to the tugger winch operator other than by hollering, one of those men could communicate with him, could he not?

MR. DANAHAR: I object to that, your Honor.

THE COURT: Objection overruled.

MR. DANAHAR: He wasn't there. He doesn't know what he could have done.

THE COURT: He is an expert. He must answer, he can state the reasons for it and also demonstrate the circumstances to support his answer.

Can you give us an answer to that, yes or no?

THE WITNESS: I can give a qualified answer. He could maybe have to run halfway up there, or he might barely be able to do it from where he was standing.

THE COURT: I am afraid that is too nebulous. There is too great non-certainty. Atmospheric conditions, the carrying of a voice. There are so many factors, Mr. Cohen, I wonder whether we need any expert testimony on that when we have got a jury that is intelligent and listening to every word. I think they can make up their own

minds on that particular point.

MR. COHEN: Your Honor is right.

Q One, perhaps, last question: In dealing with a winch of the size and type that we have been talking about in this case, Captain, can that one man operate the lever with one hand and work a pinch bar with his other hand?

A I would say no. Not safely.

MR. COHEN: All right. Thank you, Captain.

THE COURT: Do you have any redirect examination? It has been covered pretty thoroughly. I don't want to discourage you, but unless there is something important I would suggest that we not pick it up again.

MR. DANAHAR: Yes, your Honor.

THE COURT: Do you have something important?

MR. DANAHAR: I think so, your Honor.

THE COURT: Redirect examination.

REDIRECT EXAMINATION

BY MR. DANAHAR:

Q Capt. Ash, assuming a wire, or, assuming any wire, whether it be the tugger wire or the closing wire or any wire in connection with the winch has fishhooks in it, in your opinion is that an unsafe wire?

MR. COHEN: I am going to object for two reason, your Honor, if I may: One, it is improper redirect;

secondly, there has been no testimony by any witness that any fishhooks were observed in this wire.

MR. DANAHAR: May I address myself to that?

THE COURT: Surely.

MR. DANAHAR: I concede, your Honor, that there has been no direct testimony that anybody saw any fishhooks, but I think a fair inference can be drawn that in this wire there could have been a fishhook on which Mr. Anderson caught his hand.

MR. COHEN: If I may, your Honor, I don't believe an expert can be asked for opinion testimony on what could have been. I think there must be a solid factual foundation for the question to be asked.

THE COURT: We will take the testimony for the sole purpose of letting the jury, allow the testimony to help them reason it out, not as to whether there actually was a fishhook there, but even if there were could such and such have taken place. Because there has already been testimony not pinpointing a fishhook but enough to create a surmise, which is far from that degree of proof which possibly is demanded and becomes imperative.

But, nevertheless, there has been some testimony touching upon a fishhook, and when I come to the charge to the jury I will then deal with it. But right now while

the Captain is on the stand and subject to a motion to strike at the appropriate time, because he will be gone from the scene of this trial in a few minutes, I will take his testimony.

You may answer.

A Yes. Any one or more fishhooks can be dangerous.

THE COURT: Next question.

MR. COHEN: I don't believe that was the question, your Honor.

THE COURT: Yes, I will let the answer stand. You may cross on it. Next question.

Q In your opinion is that an unsafe wire?

A Yes.

MR. COHEN: Objection.

THE COURT: When you say "unsafe wire" you mean, Captain, unsafe when used in the fashion with which your testimony has dealt, in other words, the operation of this tugger winch.

THE WITNESS: I mean more than that, your Honor. Even when it's lying on the deck if you pick it up and there is a fishhook there you can get a ripped hand.

THE COURT: Well, do you mean to say that perfection of a wire, or any tool is imperative? I mean, isn't it likely in the course of human experiences that such a

camds 306 As - redirect

thing might come into existence without notice, or knowledge, or any reason to infer that it might be so?

In other words, you want the dredge people to go through every inch of the cable before they put it to use?

THE WITNESS: No, your Honor, that was not the intent of what I meant. What I meant was that even a brand-new wire could suddenly get an abrasion and you would have one fishhook.

THE COURT: Yes, sir.

THE WITNESS: But from time to time, regular and periodic inspections of wires would demand that you watch for fishhooks and on a new wire they can be eliminated by tucking the ends under, and if there's too many fishhooks it's time to discard the wire.

THE COURT: There is your answer. Now I understand you.

Next question.

Q Captain, in your opinion, and assuming there are no fishhooks in a wire, and assuming further there are no other defects in a wire, would you expect that a man who was patting such a wire that is moving would catch his hand?

MR. COHEN: Objection. That is not a proper question.

THE COURT: That is something the jury can figure

out and we don't need any expert testimony on. The objection is sustained. I do want to interrupt to say this: Captain, you testimony up to now as to the requisite number of men, as you say, that under the existing circumstances on the day with which we are concerned, the day when this accident took place in the fashion that has been described, your answer is that it would take one man to address himself to the bigger winch stands regardless of whether the cable did or did not have fishhooks?

THE WITNESS: Yes, sir.

THE COURT: All right. Is there anything else?

MR. DANAHAR: No, your Honor.

THE COURT: Recross?

RECROSS-EXAMINATION

BY MR. COHEN:

Q In connection with the last question his Honor put to you, Captain, I believe if I understood your testimony earlier correctly that most of your experience with winches has been obtained on cargo ships; is that correct?

A I have also worked on barges.

Q Yes, but the bulk of your experience has that been on cargo carrying ships?

A Yes.

Q And are you familiar with the most modern type

of cargo ships, the C-2, C-3, C-4 and C-5 classes?

MR. DAMAHAR: Objection, your Honor.

THE COURT: Objection overruled. Go ahead.

A Do you mean the hydraulic winches on the more modern ships?

Q I am talking about the more modern cargo ships, the C-2's, C-3's, and so on.

A They are not considered modern. They are twenty years old or older.

Q How about the C-4's and C-5's?

A The C-5's are mostly hydraulic winches.

Q Captain, on the C-2's and C-3's, for example, the cargo carrying winches are so arranged in tandem that one man can operate two winches, are they not?

A It varies. There are some ports where they will not allow one man operation of two winches.

THE COURT: No, the Court will not allow, even though there has been no objection, that kind of comparison without a detailed explanation as to why it becomes so on a C-2 or any other craft. I am sorry. No, that is a bad comparison.

Q Captain, in the Port of New York you have had experience with longshoremen who operate cargo winches on cargo ships, have you not?

MR. DANAHAR: I object, your Honor, unless -- well, I can't object to that question.

THE COURT: Good for you. You are withdrawing it, Mr. Danahar?

MR. DANAHAR: I withdraw it at this point, your Honor.

THE COURT: Withdrawn. All right.

A The answer is yes.

Q And isn't it true, Captain, that in the Port of New York the operation of a cargo winch is in the hands of one man?

MR. DANAHAR: Objection, your Honor.

THE COURT: Objection overruled. Is it true? What is your answer, Captain?

THE WITNESS: Yes.

THE COURT: Next question.

MR. DANAHAR: May I press my objection, your Honor?

THE COURT: He has answered. I will give you a chance to straighten it out on further testimony. You took the bit into your teeth when you got up there on redirect examination. You decided to do it. The Court asked, was there anything important. You said, yes. Now you opened up the door. I can't suddenly close it.

All right, go ahead.

Q In the Port of New York on these cargo ships the one man who operates the winch, both operates the mechanism that activates the winch and also is responsible for seeing to it that the line goes on evenly; isn't that correct?

MR. DANAHAR: Objection, your Honor.

THE COURT: Objection overruled.

Is that correct?

THE WITNESS: Not entirely, sir.

THE COURT: All right, then you go ahead and explain it, Captain.

Q What part of it is --

THE COURT: No, wait. Let him go ahead and explain it.

A Practically all American cargo ship winches have guards that the wire will not come off the drum.

THE COURT: All right. So that the comparison with what we are dealing with is out of line; is that right?

THE WITNESS: Yes, your Honor.

THE COURT: You are dealing with a different device because it has other features to it which were not present with the device with which we are concerned.

THE WITNESS: That is correct.

THE COURT: The testimony is stricken and the jury is instructed to disregard it. The Court directs you

not to engage in comparisons of that kind, sir.

Q Could you describe the kind of guard that you were just referring to?

THE COURT: Objection by the Court, sustained by the Court.

Q Have you seen cargo ships in New York that don't have that kind of guard that you have just referred to?

A Not in many years.

Q Captain, you said earlier that if there are too many fishhooks on the wire that would require discarding the wire; is that correct?

A I said it's an indication of excessive wear and the view of discarding it, or replacing the wire.

Q I believe I copied your quote accurately, tell me if it's not so, "Too many fishhooks require discard of wire" is that what you said?

A Yes.

Q Now, in a wire a half inch in diameter, 200 feet long, in your judgment how many fishhooks require discarding of that wire?

A I would have to look at the wire. It's too variable. You have got a half inch wire. You are not telling me how many strands are in each -- how many wires are in each strand, is it six strand, nineteen wires to each one?

I would still say that observation of many fishhooks would indicate excessive wear and it's time to replace that end of the wire. Maybe end for end. Reverse it and use the bitter end for the working end, and put the working end in the bitter end. So you don't have all the fishhooks.

Q And the presence of that many fishhooks could be seen by observation; is that correct?

A Usually, yes.

Q And the man who is standing next to the wire watching it, he can see those fishhooks, can he not?

MR. DANAHAR: Objection, your Honor.

THE COURT: Objection overruled.

MR. DANAHAR: It depends on many things.

THE COURT: Objection overruled. Can he see it?

THE WITNESS: Sometime.

THE COURT: Sometime. Next question.

Q Can you give us a number, an approximately number of the quantity of fishhooks that you say should be present in a wire half inch in diameter, 200 feet long before it has to be discarded?

A Well, I have to qualify that answer by saying, how many feet of wire? Usually one end of the wire gets excessive wear, and the other end stays on the drum and gets very little wear. So you reverse it. But, comes a time

when both of them -- if you see three or four fishhooks in every foot, or in ten feet, it's time to either cut that section of the wire out or get rid of the whole wire.

Q So three or four fishhooks in every foot, or ten feet, would require a discarding of the wire; is that right?

A Or a cutting out of that section of the wire, or reversing it end for end, but it would call for discarding that very badly worn part of the wire.

Q You heard no testimony in this case that there was any number of fishhooks in this wire to that amount, did you?

THE COURT: No, no. I don't want him to sit here and tell us what he heard.

MR. COHEN: Your Honor is right. I withdraw the question. It was improper.

THE COURT: Thank you. We heard it, that is the important thing.

MR. COHEN: Yes, your Honor is right. May I just have one moment, your Honor?

THE COURT: Yes, sir.

MR. COHEN: I have nothing further, your Honor.

THE COURT: All right. Now, Mr. Danahar, do you want a further opportunity? You have it.

MR. DANAHAR: Yes, sir.

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REDIRECT EXAMINATION

BY MR. DANAHAR:

Q Whether or not a person working on a winch, operating a winch where the wire is going round the drum, whether or not he could see any fishhook on the wire would depend upon a number of things, wouldn't it?

MR. COHEN: Objection.

THE COURT: Objection overruled. You asked it. He has a right to go into it.

A Yes, it would depend on many things.

THE COURT: All right, that is the answer. Next question. That is all you were asked.

Q Could you enumerate some of the things that --

THE COURT: Now, you have a right to.

A One of them, to see the amount of grease. If a cable is well greased you won't see the fishhook, but if you put your hand on it you may feel it. But you won't see it. That's one way.

Another thing, if it's flattened from going in one direction all the time you won't see the fishhooks, you won't feel it till it goes in another direction. It's a variable thing. But normally if there is not a lot of grease on, if it isn't distorted and kinked and flattened you can see it.

MR. DANAHAR: Do I understand, your Honor, that

all the testimony of Capt. Ash regarding the vessels in the Port of New York and the operation of the winches has been stricken?

THE COURT: Yes, sir.

MR. DANAHAR: The jury is not to consider it?

THE COURT: Yes. Because it involves an implement that differs from the one with which we are concerned.

MR. DANAHAR: And that also includes the testimony about where one man operates the winch?

THE COURT: On a vessel which is equipped with a piece of machinery other than the type with which we are concerned, yes, sir.

MR. DANAHAR: Yes.

THE COURT: Yes, sir.

MR. DANAHAR: Merchant vessels.

THE COURT: Yes. You see, you have got a right, as I understand the law, you have got a right to say to an expert witness, now look here, sir, here we are dealing with such and such a device; how come on such and such a craft there is a device which is different but nevertheless one man can operate it? And there is authority for the proposition that the expert may then go in and say, well, don't you see the difference? Here is the difference. In the case of the more modern, or so forth, and so forth, there

are these features which enable that to be done. And that is the reason one man can operate it as against, and so forth. But you didn't want it and I thought I had to sustain it.

MR. DANAHAR: That is exactly why I would develop what your Honor is suggesting, but since I am assured that that testimony will not be considered by the jury, I won't develop what you suggested.

THE COURT: Very well.

MR. COHEN: May I develop it, your Honor? May I ask a question along the lines your Honor was discussing?

THE COURT: I gave you your chance to ask your questions. You said you were finished. I turned to Mr. Danahar, he has had his chance, he asks me whether my ruling embraces a certain area, and I said, yes, and now you come and ask me for an opportunity to develop a theory that I said had importance.

MR. COHEN: Because I thought I asked that question and I thought your Honor sustained an objection. I wanted to get a description of the feature that he says is on the --

THE COURT: Let's go.

MR. COHEN: May I?

THE COURT: Yes. Both sides will have it.

RECROSS-EXAMINATION

BY MR. COHEN:

Q Capt. Ash, tell us the name of that feature that I say is found on the cargo ships in the Port of New York that helps the line, or the cable wind evenly onto the drums of the winch, which device is not present on this tugger winch.

What do you call that device?

A There are several devices. There are mechanical fairleaders on many of them, the principal feature, the vast difference between --

Q I am sorry.

THE COURT: No, I want it. Go ahead.

MR. COHEN: I don't want the --

THE COURT: I am sorry. You go ahead, and I want to cut this short and I don't want a long diatribe. Go on now.

A The principal feature between the winches, cargo winches, the size of the drum on the cargo ship is so large as compared to this winch drum that there is plenty of room for the wire on the drum, whereas there is just barely enough room on the tugger winch drum because it's so small to get all of that wire on it. You do not have that problem on the winches on the cargo ships.

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THE COURT: All right. What else?

THE WITNESS: There are also guards, bars across it, there are guards over the lip of the drum, there are metal guards over the gears so that the wire can't jump out and get caught in the gears.

THE COURT: Is there anything, any device with regard to such equipment that you have been describing that enables the cable to go from one end of the spool to the other without having to have some one manage that feature?

THE WITNESS: Yes indeed, your Honor. Many ships are equipped with a spooling device. It's just like the spooling device on a fishing reel, or in a sewing machine that winds a thread on a bobbin. It goes back and forth, back and forth. As the wire is winding up it moves back and forth. And many of the modern ships, the cargo vessels, have a spooling device on the winch that nobody has to touch the winch at all, it winds back and forth automatically.

THE COURT: Next question.

Q Do you have those type of devices on the Victory or Liberty ships?

A No, I did not.

MR. DANAHAR: Objection, your Honor.

THE COURT: The objection is overruled.

MR. DANAHAR: That is going back thirty years.

camds 319 Ash - recross

THE COURT: He wants to show the jury Capt. Ash doesn't know what he is talking about.

MR. DANAHAR: He is going back thirty years, your Honor.

THE COURT: He has got a right to do that. Whether he succeeds, I don't know. Go ahead. How about the Liberty ships?

Q You are familiar with the Victory and Liberty ships, are you?

A Yes.

Q On Victory and Liberty ships working cargo here in New York wasn't it only one longshoreman that operated a winch?

THE COURT: Objection sustained.

MR. DANAHAR: Objection, your Honor.

THE COURT: That is going to be a detailed description. Now, do you want anything else?

MR. COHEN: I am sorry. Me, your Honor?

THE COURT: Yes.

MR. COHEN: No.

THE COURT: How about you, Mr. Danahar?

MR. DANAHAR: Yes, your Honor.

THE COURT: Go ahead.

MR. DANAHAR: May I approach the witness with this,

your Honor?

THE COURT: Surely.

REDIRECT EXAMINATION

BY MR. DANAHAR:

Q Look at this picture, Capt. Ash, and tell us what that shows [handing].

MR. COHEN: I have to object.

THE COURT: Sure. The objection is sustained.

Q You have been asked questions about a cargo winch on merchant vessels, haven't you, Captain, by Mr. Cohen?

THE COURT: Mr. Danahar, save your voice. The Captain has given testimony under oath that makes clear the difference between other equipment and this, and I don't think in light of that that you should continue to pursue it. You can never overcome or enlarge the basic tenet that he has pronounced as his sworn testimony if you stayed here all afternoon. To find a different variable on some piece of equipment, that there might be some device that sings a song and puts the operator into a happy mood, or anything else. That doesn't help us any.

The basic point has been made by the Captain, and I wonder whether there is any sense in embellishing on that.

MR. DANAHAR: Your Honor, I accept your suggestion.

THE COURT: I think it is wise.

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MR. DANAHAR: Thank you, your Honor.

THE COURT: You are excused, Mr. Witness.

[Witness excused]

THE COURT: Next witness.

MR. DANAHAR: Your Honor, I have no further witnesses.

THE COURT: Very well then. I take it that all your proof is in except the calling of your doctor at 9:30 next Tuesday morning. Am I correct?

MR. DANAHAR: As far as witnesses. But we have stipulations, you know, your Honor.

THE COURT: Yes. My answer is, right?

MR. DANAHAR: Yes, sir.

THE COURT: Subject to further stipulation which you are about to place upon the record.

MR. DANAHAR: Yes, sir, and subject to the life expectancy, and so on.

THE COURT: Yes. I want all of that. I want life expectancy, I want work expectancy to be agreed on.

Now, what else have you got? What do you want to call the jury's attention to that you have stipulated to? How about the lost time? Time loss?

MR. DANAHAR: Yes, your Honor.

THE COURT: The books certainly will show what

days he came to work and what days he didn't since he has had his accident. You can examine them just as well as we can.

MR. COHEN: May I read our stipulation into the record, your Honor?

THE COURT: Is that all right?

MR. DANAHAR: All right. You were asking me, your Honor, and he is taking over. If he wants to take over it's all right. Go ahead.

THE COURT: What do you care? As long as it is in the record.

MR. DANAHAR: All right.

MR. COHEN: It is my handwriting on my paper. We agreed on this last night as your Honor said we should.

THE COURT: Let him do it as long as he has got it. It is agreeable to you. As long as the jury gets it, that is the outfit you have to be sure understands.

MR. DANAHAR: All right.

MR. COHEN: Without this being in any way understood to be a concession by the defendant that it is liable or responsible for these amounts, your Honor.

THE COURT: Certainly.

MR. COHEN: We did stipulate, Mr. Danahar and I, that as a result of the time lost from work by Mr. Anderson,

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first for the period from the time of the accident up until the time he returned to work in June of 1971, and, secondly, for the subsequent period when he went back to the hospital for the operation in May of 1972, up until the time he returned to work in September of 1972, he lost a total amount of earnings of $11,400.

We further stipulated, your Honor, that pursuant to his rights as a seaman Mr. Anderson was given maintenance pay at the rate of $70 a week during each week that he was out of work in the periods I have said, and that comes to $3,374, thus giving him an out-of-pocket loss of earnings, your Honor, of $8,026.

MR. DANAHAR: No. Now I disagree with that statement, your Honor, about out-of-pocket loss of earnings. Maintenance is something separate and apart from earnings. And a seaman is entitled to it if he is injured in the course of his employment.

THE COURT: All right, the $11,000 is the amount he has lost in wages up to today; is that right, Mr. Danahar?

MR. DANAHAR: $11,400. And I would like, your Honor, if you don't mind, just to break it down.

THE COURT: Sure.

MR. DANAHAR: For that first nine months that he was out of work he lost $8400.

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THE COURT: Yes, sir.

MR. DANAHAR: And for that second period he was out of work after the second operation in 1972 he lost $3,000.

THE COURT: Yes, sir. Now, is that recital all right? We will come to the maintenance in a minute.

MR. COHEN: Not without the maintenance, your Honor, because the law says --

MR. DANAHAR: I won't --

MR. COHEN: May we approach your Honor at the side bar?

THE COURT: Hold it just a minute. All I want to know is are these figures correct subject to anything else that the Court should rule it must call to the attention of the jury? These were the earnings he would have earned if he had not been injured; is that right? If he reported to duty during that period he would have had $8400 for the first period, he would have had $3,000 for the second making a total of $11,400?

MR. DANAHAR: That's right.

THE COURT: Am I right on that?

MR. COHEN: Yes, your Honor.

MR. DANAHAR: Yes, your Honor.

MR. COHEN: But I am saying, and we have agreed,

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that he would not have then received this additional --

THE COURT: Now let's talk about that. We will talk about that. I will get it to the jury. I will get it, don't worry about it. I want to get your thoughts and we will talk about it. I will call it to the attention of the jury. The Judge says so on the record. I want to hear your reasoning.

Now, what else have you got by way of proof or stipulation of any kind, because stipulation is a part of the proof.

MR. DANAHAR: We have further stipulated, your Honor, the following --

MR. COHEN: Wait a minute. That is not accurate. I stipulated that a witness if called would give a certain type of testimony. But I have some objection to the admissibility of parts of this.

THE COURT: We will have to talk about that. Is there anything else that you have agreed on? Because I want to grab what you have agreed on before it vanishes, that's all.

MR. DANAHAR: May I have a moment, your Honor?

THE COURT: All right. The jury is excused for a short recess and we will come back as fast as possible.

[Recess]

[In the robing room]

THE COURT: There has been an off the record discussion in the robing room, and it has all been of benefit to counsel on both sides and to the Court, and I am grateful to counsel.

One of the items that should be placed upon the record, and which we discussed in the last ten or fifteen minutes, deals with the concern that Mr. Danahar had with respect to his inability to call to the stand Bruce Anderson, the brother of the plaintiff. Mr. Danahar had made it clear, either on or off the record in the past few days, that he understood that the brother, Bruce Anderson, was unable to leave his bed because of illness and could not appear as a witness, and was fearful that his failure to get him here might very well enable Mr. Cohen in summation, as would be his right, to comment on the failure to call Bruce Anderson.

I suggested a few days ago that possibly a certificate, or a few lines by the doctor treating Bruce Anderson, might be found acceptable to Mr. Cohen after he examined it. I by no means asked him to curtail the rights that he felt he might have, but that possibly he would see his way clear to cutting the matter short if he found that he was more or less convinced of the earnestness of the doctor's statement.

At any rate, it has been agreed that Mr. Cohen

will not in the course of his summation make any comment whatever with respect to the failure to call Bruce Anderson to the stand, and Mr. Danahar for his part has agreed in no way to mention the failure of Bruce Anderson to appear in court.

I should like for the sake of the record merely to read the statement of the doctor who is treating Bruce Anderson. It is dated 2/13/74. The doctor is Edward J. Matthews, M.D., 7379 Amboy Road, Tottenville, Staten Island.

"To whom it may concern, due to an accident at work January 26, 1974, Mr. Bruce Anderson injured his back. He is under treatment and will not be able to appear in court. E.J. Matthews, M.D."

Now we come to another point, and that deals with the mate and deck hand wages as reflected by a table that Mr. Cohen has examined and finds generally acceptable and sufficient so as not to interpose any opposition to its being called to the attention of the jury. It gives the figures of a mate's earning power and deck hand from the period 1971 up to today, isn't that it?

MR. DANAHAR: His hourly rates, yes.

THE COURT: All right, let's have them. What are you going to say to the jury on that score?

MR. DANAHAR: That the hourly rate of a mate

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from October 1, 1971 to September 30, 1972 was $5.65, and from the period October 1, 1972 to September 30, 1973, the rate was $6.17, and from the period October 1, 1973 to September 30, 1974, the hourly rate is $6.54.

THE COURT: Yes. That is for a mate.

MR. DANAHAR: For a mate.

THE COURT: And deck hand?

MR. DANAHAR: And deck hand, for the period October 1, 1971, to September 30, 1972, is $4.79, from October 1, 1972 to September 30, 1973, the hourly rate was $5.22, and from October 1, 1973 to September 30, 1974 the hourly rate is $5.52.

MR. COHEN: And we further agreed to stipulate that the plaintiff working at the present time is being paid at the same rate as a deck hand.

MR. DANAHAR: But working as a handyman.

MR. COHEN: I am talking about the rate, the rate the plaintiff receives is that of a deck hand.

THE COURT: That is correct.

MR. DANAHAR: I will put the handyman's rate in.

MR. COHEN: Can't you stipulate the way we agreed to? That he is being paid at the rate of a deck hand?

THE COURT: Of a deck hand. He is a handyman, but --

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MR. DANAHAR: He's a handyman, but he's being paid at the rate of a deck hand.

THE COURT: That is all he said. All right. Now, gentlemen, I suppose it is acceptable to you to allow the court reporter to read that to the jury, what has just been recited by Mr. Danahar, and your comment in addition, and so forth. Is that all right?

MR. COHEN: Not the Bruce Anderson part, though.

THE COURT: No, no. I mean the figures, the tables.

MR. COHEN: Fine.

THE COURT: All right. Now, let the record also show that counsel have agreed that the item of maintenance is to be called to the attention of the jury. I intend to say to the jury, in substance, as you remember, ladies and gentlemen of the jury, just before you stepped off for recess, the amount of wages lost during the two periods involved totaled $11,400. I would like you also to know that under a proposition of law known as maintenance, and I don't think you need to be bothered with its details, but there actually had been paid by the defendant to the plaintiff during this same period of time the sum of $3,374.

Mr. Danahar, is that acceptable?

MR. DANAHAR: The only thing I would like your Honor to do to make it clear, and you do it whichever way

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you want, that this is not compensation that he is getting. You see, I don't want the jury to get the idea that he is entitled to compensation.

THE COURT: In the future with regard to this? Is that what you mean?

MR. DANAHAR: You know, a lot of jurors know about the compensation act, but this is not compensation. This is a maritime benefit.

THE COURT: All right.

MR. COHEN: I don't think we ought to go into it that way.

THE COURT: Well, he is worried, properly, about something.

MR. COHEN: I am worried about the converse of that, and I think we are opening a Pandora's box with a proposition that doesn't apply here. We had a stipulation as to how much he was earning, what he lost by the time out and the fact that during that time out period he received $70 a week for a total of $3,374, and I think that's sufficient.

THE COURT: And that is all.

MR. COHEN: That is really all.

THE COURT: And I don't have to say anything with regard to anything, up-to-date, and that's all. You under-

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stand that is the extent of the stipulation. It doesn't go any further. You are not to gather anything further from it, you see, that cuts off any speculation.

Will that be satisfactory?

MR. DANAHAR: You see my point, your Honor.

THE COURT: Yes, but you can see mine. I am going to say to them, you are not to speculate as to anything but the plain fact, I didn't say anything about the future, did I, ladies and gentlemen? I am just saying,up-to-date that is all that has been paid over by way of maintenance, that is the sum, $3,374. What is wrong with that?

MR. DANAHAR: There's nothing wrong.

THE COURT: I don't think so.

MR. DANAHAR: I just don't want the jury to get the idea that this fellow --

THE COURT: Will continue to get it?

MR. DANAHAR: Yes, that's right.

THE COURT: I am telling you. I think by the time I get through you will be satisfied. I hope you will.

All right now, what else is there, Mr. Cohen? Anything else we can accomplish here? Oh, yes, we are going to --

MR. COHEN: Is Mr. Danahar resting except for his doctor?

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THE COURT: Yes, he is resting except for the recital of what has been accomplished here in this room, plus the tables dealing with life and work expectancy, plus the calling of a medical witness Tuesday morning, and that's it.

MR. DANAHAR: And the introduction of medical records.

THE COURT: Of course, that is in connection with his testimony. Is that right, sir?

MR. DANAHAR: Yes, sir.

THE COURT: All right.

MR. COHEN: Would this be a good time, Judge, in view of the fact that we are out of the jury's presence, to make the motions which I would make at the end of Mr. Danahar's case?

THE COURT: Yes, and you can repeat them again.

MR. COHEN: Would you rather I wait until Tuesday?

THE COURT: It is up to you. It is a question of whether it is effective to make a motion at this point. Of course a laywer can argue that no matter what he puts in by way of medical evidence the effect is so overwhelming that there ought to be a dismissal of the action.

MR. COHEN: Let me make my motion now, if I may, and reserve my rights to make them later.

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THE COURT: Yes, sir.

MR. DANAHAR: I feel that while it is unlikely that anything will develop in the medical testimony which might support my position that I made out a prima facie case there still remains that possibility that something might develop, and I don't really think it is the appropriate time to make the motion.

THE COURT: I can't imagine anything a medical man could say that would interfere with a defect, a basic defect in the cause of action that all the doctors in the world couldn't cure.

MR. DANAHAR: I am inclined to agree, your Honor.

THE COURT: All right, go ahead.

MR. COHEN: The first motion I would like to make, your Honor, is to strike all testimony regarding the possibility of a fishhook in this wire, and I call your Honor's attention to the fact that the plaintiff himself, who was the only person handling that wire, testified that he saw no fishhook and knew of no fishhook. It was only in response to a series of questions by your Honor that this was the operation of his mind, that there may have been a fishhook, and on the basis of that operation, that mental operation on his part, elicited by your Honor there has developed a quantity of testimony regarding fishhooks.

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I believe that there is no solid foundation in this record for that testimony, that it doesn't belong there, it is speculative and conjectural, it is inferential, it calls for the drawing of inferences on inferences and I respectfully ask that all that testimony be stricken.

THE COURT: Very well. I will hear counsel on the other side before I make my ruling on it.

What do you want to say, if anything? Before you say it, I want to go off the record.

[Discussion off the record]

THE COURT: On the record. Off the record for the last few minutes I have talked to Mr. Danahar and tried to reason out with him the value of this testimony and the jeopardy to the justice in the case if it is insisted on, unless there is sufficient in the record to support the making out of such a claim by way of evidence that is not tenuous and of such quicksilvery nature as not to be able to be labeled as an approach to positiveness. But Mr. Danahar is of the opinion that it is a strong point, and I do not want him to give up anything that he believes in, and, accordingly, we are now back on the record and he can now state for himself what position his client takes with regard to the motion to strike out everything dealing with the fishhook.

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MR. DANAHAR: If your Honor please, I think the motion should be denied because I think there is sufficient evidence upon which a jury could draw a reasonable inference that it was a fishhook that caught this man's hand, a fishhook in the wire that caught this man's hand and pulled it into the drum. His testimony was that he was just patting the wire, that his hand got caught, and there has been testimony that fishhooks do develop in wires, and while the plaintiff himself has honestly admitted he didn't see a fishhook, that is perfectly understandable because fishhooks are not generally large pieces of metal that you can see, particularly in a moving wire.

Furthermore, he was devoting his attention to handling the lever and to what was going on out on deck, and for that reason he truthfully said he couldn't say whether or not there was a fishhook, but he did say that his hand got caught, and I think the jury could draw a reasonable inference that there must have been a fishhook, or some other defect in the wire upon which his hand got caught. And for that reason I --

THE COURT: Do you admit that there is no testimony on the condition of this particular cable on that day, that he was attempting to wind around the drum? Do you admit there isn't a bit of testimony on how new it was, how old

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it was, how many fishhooks, if any, it had? Do you admit that is so? This is for my own guidance, because I am going to reserve decision. I want my attention called to anything that you think I ought to consider, that is all. Am I not right?

MR. DANAHAR: Would you ask me that again, your Honor? There was one part I wasn't sure of.

THE COURT: Yes. Is there any testimony in the record with regard to this particular coil, this particular cable that we are concerned with, that your client handled on the day of the accident in that cab body that he was trying to get wrapped around, so to speak, the drum, is there anything in the record with regard to how old or how new that particular cable was, or whether there was any fishhook or any imperfections of any kind with respect to it?

MR. DANAHAR: There is no testimony that I know of where anybody testified that there was a fishhook in the cable. I am not sure, though, that there wasn't some testimony as to the fact that this wire had been on there before and was not a new wire.

THE COURT: All right. Are you through?

MR. DANAHAR: Frankly, your Honor, I can't, you know, be sure of --

THE COURT: It is your case.

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MR. DANAHAR: [continuing] of all the other things that you have asked me to admit to.

THE COURT: All right. I am going to reserve decision on it. I have great doubt about Mr. Danahar's position on it. I think Mr. Cohen is well advised, but that is only subject to my further reflection and with an opportunity to Mr. Danahar by Tuesday to give me anything at all, or, if you can tomorrow I would appreciate it, send it over, or anything, with a copy to Mr. Cohen, that indicates anything different from what has been disclosed right at this juncture. All right?

Decision is reserved. What else, Mr. Cohen?

MR. COHEN: I would now like, if your Honor please, to move to strike all testimony relating to the absence of a signalman at the door of the cab for the following reason: That the presence of absence of another man seven feet away at the door of the cab could have no proximate causal relationship whatever to the kind of accident that has been described in this case. The positioning of such a man, especially in view of Mr. Ducey's testimony that during the time before the accident happened he had no signals to convey. The presence of absence of a signalman at the door could have had no proximate relationship to the accident.

THE COURT: But if in the course of the operation

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Mr. Ducey had some message to convey, and were the plaintiff made to recognize that he had to be on the lookout, so to speak, for signals, and with all that noise in the area while he was carrying out his operation, all of these are factors I am afraid that in my humble estimation defeat the ground you now advance. I do not support it, and I would say on that ground your motion is denied.

MR. COHEN: I respectfully except.

THE COURT: Yes, sir.

MR. COHEN: I have another motion I would like to make.

THE COURT: Yes, sir.

MR. COHEN: I move at this time to strike all testimony regarding the need for two men to be operating the tugger winch, on the ground that if the plaintiff's task was to guide the wire and he was tapping it with his hand, as he said was doing at the time of this accident, the accident would have occurred notwithstanding the fact that someone else was there.

THE COURT: That is an issue for the jury. Denied.

MR. COHEN: I think then, your Honor, the motion I am about to make is a combination of what I may have made before, but just so the record is complete, I respectfully move at this time for dismissal of the plaintiff's case

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on the grounds that there has been no prima facie showing that warrants submission of this case to the jury on the grounds that we have an unexplained accident, it hasn't been shown that there was anything defective in the equipment supplied to the plaintiff, nor has there been a showing of any proximate relationship between the plaintiff's contention that it was a three man job and the happening of the accident.

THE COURT: Denied. Is there anything further?

Therefore, gentlemen, with the understanding that the motion is to be renewed, and any additional grounds advanced at the time of the renewal in support and in opposition to the motion to dismiss, which will undoubtedly take place sometime next Tuesday morning after the medical testimony on both sides has been completed, with that understanding we will leave the record the way it is.

Let us go forward. It is now 3:25, let us go forward with the defendant's proof with the distinct understanding that the defendant is not to be jeopardized in any way by the Court's direction that the proof be taken at this juncture, even though the plaintiff's case is not completely in. All right?

Off the record.

[Discussion off the record]

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[In open court - jury present]

THE COURT: Ladies and gentlemen, we have accomplished quite a bit. With the help of counsel on both sides a great deal of the proof has been minimized, and without their getting together it would take quite a long period of time to put in proof on this score, and so I am obliged to them. It may very well be that the Judge sometimes has to be somewhat severe, like a pretty firm schoolteacher who says, I don't want any excuses, you stay up all night and do your job and let me see it next morning, that is in the nature of things. But these lawyers are doing their best according to their lights, and I want you to do know that I appreciate their cooperation.

Now, here is what has been accomplished: Counsel have agreed that the lost wages to which your attention was called before the recess is correct up to the date, today's date, of $11,400, but counsel also agree that during that same period of time under a law dealing with what we call maintenance, the defendant has paid over to the plaintiff the total sum of $3,374, which amount the defendant would not have paid except under the particular circumstances involved here.

Now, by that I mean you are not to engage in any conjecture as to whether this maintenance continues, it

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doesn't continue, or what. All you are told is that the plaintiff lost $11,400 in wages and has received up to now $3,374 by way of maintenance, period, and that's it.

Do you understand that? Because there is a great deal of uncertainty with regard to the future and all that sort of thing, all of which I will explain to you, so that you can only take what is conceded, and you cannot say, that means in addition such and such and such and such. You understand that. You just take what is given to you, and that is that.

Now we go on to something else. There is a table which counsel have been good enough to agree on, a table that reflects the wages paid to mates and deck hands aboard such craft as the one with which we are dealing, and I am going to ask our good court reporter to read to you what the attorneys on both sides have agreed to with regard to the table reflecting the hourly wages of a mate and of a deck hand during the period that will be disclosed in the stipulation.

Will you do so, please, Mr. Court Reporter.

[The record was read]

THE COURT: Very well. Now, was there anything else? I think that covers what we did, plus other arguments that the jury was not concerned with.

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All right. Now, Mr. Cohen, will you proceed.

MR. COHEN: Yes, sir. I would like to call Mr. Rankin to the stand, your Honor.

THE COURT: Yes, sir.

J O S E P H G. R A N K I N, called as a witness by the defendant, being first duly sworn, testified as follows:

THE COURT: Mr. Rankin, I say this to all witnesses: Please, sir, raise your voice so that the jury can hear. They are the ones who have to decide this case. If they don't hear you, they miss testimony which they must not allow to happen; you understand?

THE WITNESS: Yes, sir.

THE COURT: Please remember that you are bound by rules in a courtroom. You can't talk about anything the way you would outside. Therefore the law says, make the witness respond only to the question that is put to him. You are not to volunteer anything. You are asked a simple question, you give a simple answer, yes, no. As often as you possibly can. But don't volunteer anything. These are smart lawyers and if they don't know how to get something out of you, that is their loss, not yours. Do you understand that?

THE WITNESS: Yes, sir.

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THE COURT: All right.

DIRECT EXAMINATION

BY MR. COHEN:

Q Mr. Rankin, I believe you are the office manager for Great Lakes Dredge & Drydock Company; is that right?

A I am.

Q Mr. Rankin, sometime after the accident to Mr. Anderson on October 18, 1970, did you visit him in the hospital?

A I did.

Q Can you tell us approximately when that was?

A October 20, 1970.

Q When you saw Mr. Anderson in the hospital on October 20, 1970, who else was with you?

A With me?

Q With you and Mr. Anderson. Was there anyone else present?

A Yes, his wife.

Q Was Mr. Anderson at that time in bed or out of bed?

A Out of bed.

Q Did you have a conversation with Mr. Anderson at that time on October 20, 1970, as to how this accident happened?

A Yes, I did.

Q Please tell us what he told you.

A I asked him how it had happened, and he said that they were changing the closing wire end for end, that he was at the time performing this action, the dredge lurched possibly because of a ground swell and he was thrown over the drum, he left arm was caught in the cable and he was wound around the drum and tossed to the rear of it.

MR. COHEN: I have nothing further, your Honor.

THE COURT: Cross.

CROSS-EXAMINATION

BY MR. DANAHAR:

Q Mr. Rankin, do you remember that you attended at Mr. Cohen's office back on December 13, 1973, to testify in this case?

A Yes, sir.

Q And I was there present and I asked you certain questions about this matter?

A Yes, sir.

Q And you were under oath and you swore to tell the truth?

A Yes, sir.

Q Did you hear these questions and did you these answers at the time that I asked you on that date:

"Question: With respect to item 25 --"

MR. DANAHAR: Before I proceed, your Honor --

THE COURT: You will start again.

MR. DANAHAR: Yes, may I start again?

THE COURT: You are going to show him Plaintiff's Exhibit No.3 in Evidence?

MR. DANAHAR: Yes, sir.

Q Would you take a look at Plaintiff's Exhibit No.3 in Evidence, Mr. Rankin [handing]?

A Yes, sir.

Q Now, you see item 5 in Plaintiff's Exhibit No.3 -- item No.25, excuse me?

A Item 25, yes.

Q And that is a typewritten part of that report; isn't it?

A That's right, sir.

Q And you typed that in, didn't you?

A Yes, sir.

Q And you typed that in after you spoke to Mr.Anderson at the hospital, didn't you?

A Yes, I did.

THE COURT: Would you be good enough to read that to the jury so as to refresh their recollection, Mr. Rankin? Would you read it, what you yourself typed in as item 25

on Plaintiff's Exhibit No.3 after talking to Mr. Anderson?

THE WITNESS: Yes, your Honor. "Injured was engaged in changing holding cable end for end. His left hand was caught in cable and he was pulled onto and over the drum on which the cable was being wound."

Q Now, in that report you didn't put anything down about the dredge lurching because of a ground swell and that he fell over, or fell into the drum, did you?

A No, sir.

Q And that is the information that Mr. Anderson gave you when you saw him in the hospital, isn't it? What you put in that report?

A That's part of it, yes.

Q That's part of it. Was there more information he gave you?

A What I have previously stated.

Q All right. Now I refer back to the examination in Mr. Cohen's office when you testified under oath, and do you remember these questions and giving these answers:

"Q With respect to item 25, who typed in that information?

"A I did.

"Q And where did you get that information from?

"A Anderson.

"Q And when did you get it?

"A The day after the accident when he was in.

"Q When he was in where?

"A Doctor's Hospital.

"Q You went over to see him at the hospital?

"A Yes.

"Q You spoke to him about the accident?

"A Right.

"Q And that is what he told you happened to him?

"A Yes.

"Q Did he give you any other information regarding the accident?

"A No, sir."

THE COURT: Do you remember those questions being put to you and you giving those answers?

THE WITNESS: Yes, sir, I do.

THE COURT: Next question.

MR. DANAHAR: I have no further questions, your Honor.

THE COURT: All right. Step down.

MR. COHEN: May I, your Honor, just a moment? I have one or two questions.

THE COURT: With regard to the cross?

MR. COHEN: Yes, sir.

THE COURT: All right, go ahead.

REDIRECT EXAMINATION

BY MR. COHEN:

Q Mr. Anderson, can you identify this sheet of paper which has been marked as Defendant's Exhibit D for Identification [handing]?

MR. COHEN: I am sorry, I didn't mean "Mr. Anderson" I meant "Mr. Rankin."

THE COURT: Yes or no?

A Yes, sir.

Q And can you just tell us what that sheet of paper is?

A It's a statement I made --

THE COURT: Wait a minute. Wait a minute. Wasn't that dealt with by the Court before? Didn't I make a ruling that that was not admissible?

MR. DANAHAR: Yes, you did.

MR. COHEN: I am now trying to lay a foundation for it, your Honor, through this witness on the stand. Before it was just in connection with the deposition reading by Mr. Danahar. Now the witness is here in court and on the stand.

THE COURT: To do what? To lay a foundation for what?

MR. COHEN: For its offer into evidence.

THE COURT: All right, go ahead. What is the question, Mr. Cohen?

Q Can you tell us what that sheet of paper which is presently marked Defendant's Exhibit D for Identification is?

THE COURT: No, you can't ask him what it is. That is something that is not in evidence. He gives the whole thing out before I have had a chance to rule on it.

MR. COHEN: I didn't mean him to read it, your Honor.

THE COURT: No. Tell us the essence of the --

MR. COHEN: No, not the essence of it. Not what it is, what it says.

THE COURT: It is a report, is that what --

MR. COHEN: It is a statement.

THE WITNESS: It's a statement.

THE COURT: All right, that is all you can do.

Q Is that your statement?

A Yes, sir.

THE COURT: Is it in your handwriting, Mr. Rankin?

THE WITNESS: No in my handwriting.

Q Is it signed by you, Mr. Rankin?

A Yes, it is.

Q Does it indicate the date that you signed it?

A March 19, 1971.

MR. COHEN: I would like to offer that statement in evidence now, if your Honor please.

MR. DANAHAR: Objection, your Honor.

THE COURT: You object to Exhibit D marked for identification?

MR. DANAHAR: Yes, your Honor.

THE COURT: Let me read it. Counsel and the court reporter will please come into the robing room. Keep your seats, ladies and gentlemen.

[In the robing room]

THE COURT: Gentlemen, I called you in not because I have much doubt that this is inadmissible, but I wanted to be sure Mr. Cohen had an opportunity to spread upon the record without the jury hearing him why you think this goes into evidence. On what basis?

MR. COHEN: Thank you. I appreciate the opportunity, your Honor.

THE COURT: Yes, sir.

MR. COHEN: It is a prior consistent statement which I believe is properly admissible on rehabilitation of a witness following cross-examination along the lines that Mr. Danahar has conducted. This statement is dated

March 19, 1971 and was given by this witness almost three years before the deposition testimony that this witness gave which Mr. Danahar read and as a prior statement consistent with his testimony in court, your Honor, I believe it is admissible.

THE COURT: All right. Now, what do you say?

MR. DANAHAR: I don't believe that is so at all, your Honor.

THE COURT: All right. I am going to reserve decision on it, study it, take it from the courthouse myself, read it with great care and make my ruling on Tuesday. So that there is nothing further that either one of you have with Mr. Rankin, and all that we have got left --

MR. DANAHAR: Well, except the --

THE COURT: Will you give me a chance? All you have got left with regard to Rankin's testimony is the Court's ruling with regard to Exhibit D marked for identification.

MR. DANAHAR: Except for this, your Honor: If your Honor rules that it is admissible then I would have more questions to ask Mr. Rankin.

THE COURT: There is a great deal in what you say and in which event you will have Mr. Rankin available on a telephone call. All right?

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MR. COHEN: Would you direct him to come back at the end of today's session, please?

THE COURT: Yes. I will tell him to come back in the courtroom, he may be needed next Tuesday morning. I will tell him to be here at 11:00 o'clock or something like that. Is that all right?

MR. DANAHAR: Yes, sir.

MR. COHEN: And if we don't need him, we can call him off.

THE COURT: Now tell him to go home.

MR. COHEN: Right.

THE COURT: You are all through with him?

MR. COHEN: I am all through with him.

THE COURT: You are all through with him, except for the ruling of the Court on Exhibit D marked for identification?

MR. DANAHAR: That's right.

THE COURT: All right, let's go.

[In open court - jury present]

THE COURT: The net result of all this, ladies and gentlemen, is you heard Mr. Cohen offer into evidence a paper marked Exhibit D for identification, Mr. Danahar objected to it. I am inclined to believe that it is not admissible, but in the event after thinking about it and

examining further into the law with relation to it, if I should decide that it is admissible then I would want to give Mr. Danahar a further opportunity to examine the witness with regard to it. If I hold to my initial impression that it is not admissible, then we will not need any further testimony from Mr. Rankin.

Here is the way it winds up: You are through with your testimony, Mr. Rankin, today, but the Court direct that you be here at 11:00 o'clock next Tuesday, that is the day after Washington's Birthday, you come to court so that you can take the stand if, as and when I decide necessary.

THE WITNESS: Thank you.

THE COURT: You understand?

THE WITNESS: Yes, sir.

THE COURT: I don't want to start hunting all over for you. I want you to be available. If we are not going to use you within a few minutes after 11:00 you will be told to either go or stay. Is that understood?

THE WITNESS: Yes, sir.

THE COURT: You may leave.

[Witness excused]

THE COURT: Next witness, Mr. Cohen.

MR. COHEN: I would like to call Capt. De Graff, your Honor.

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THE COURT: Yes, sir.

MR. COHEN: I am not sure if he is in the witness room, or --

THE COURT: Capt. De Graff.

G E O R G E D E G R A F F, called as a witness by the defendant, being first duly sworn, testified as follows:

THE COURT: Capt. De Graff, I say this to all witnesses, and I don't make any exception with you: You are giving testimony under oath before this Judge and before this jury. It is imperative that you raise your voice the way you would give a command aboard ship to men who are to hear you, because the jury must hear what you have to say. That is number one.

Number two, when you are asked a question you answer it yes or no, you do not start making these speeches. You will answer only what you are asked.

You are to volunteer nothing. That is the rule of law, which is the rule equivalent, so to speak, of the rule at sea. You don't give an order and then have to give an explanation. You give an order, and that's it, and your men have to carry it out. Is that not so?

THE WITNESS: That's right.

THE COURT: And that is the same thing in a court

of law. You just have to do what the Judge directs you to do. Is that clear?

THE WITNESS: It is.

THE COURT: All right. Go ahead.

DIRECT EXAMINATION

BY MR. COHEN:

Q Captain, is I stand back here and I reach you with my voice will you try to reach me with your voice?

A I will, sir.

Q Very good.

Capt. De Graff, do you remember October 18, 1970, the day that Mr. Anderson was injured?

A I do.

Q On that day were you the captain of the Dredge No.50?

A I was.

Q For how many years before that had you been captain of the Dredge No.50?

A Since September of 1965.

Q In September of 1965 who were you employed by?

A I was employed by the Arundel Corporation.

Q In other words, at that time Arundel Corporation owned the Dredge No.50; is that correct?

A That's right.

Q As a matter of fact, at that time they had a different name, did they not?

A That's right.

Q What was it called, the BALTIMORE?

A It was called the Dredge BALTIMORE.

Q When was it that Great Lakes bought the Dredge No.50 from Arundel?

A In the latter part of March, 1967.

Q And when Great Lakes bought the Dredge BALTIMORE from Arundel, at that time they changed the name to the Dredge No.50; is that correct?

A Yes, sir.

Q But you continued serving aboard the dredge as her captain when Great Lakes bought it; am I right?

A I did.

Q After October 18, 1970, did you continue working as the captain aboard the Dredge No.50?

A I did.

Q For how long?

A Until July 1st, 1973.

Q Is that when you retired, sir?

A That is.

Q And have you been retired since?

A I have.

Q Was that day, do you remember, a Sunday?

A It was a Sunday.

Q Can you tell us about what time the men on the crew of the No.50 came to work that day?

A They have to catch the boat leaving the dock at 7:30 a.m.

THE COURT: What is that? What is that? What did you say?

THE WITNESS: They had to leave the dock on --

THE COURT: I didn't ask you that. You were asked what time. That calls for an hour. You don't have to give any explanation.

THE WITNESS: 7:30.

THE COURT: 7:30? Is that what you said?

THE WITNESS: 7:30.

THE COURT: Next question.

Q Now, was the Dredge No.50 out in the water at that time?

A Yes.

Q How did the men get from the land over the water to the Dredge No.50?

A On a boat.

Q Was it at 7:30 that they took this boat to get to the dredge?

A Yes, sir.

Q Can you tell me approximately what time it was that the crew actually arrived on board the dredge that morning?

A Approximately 7:45.

Q Was that day Sunday, October 18, 1970, a day that the dredge was to do any actual dredging in the river?

A No, sir.

Q What kind of a day was it for the dredge?

A A repair day.

Q When the crew arrived aboard the dredge that morning did you tell anybody in the crew what work was to be done by them that day?

A Yes, sir.

Q Who did you tell?

A Mr. Eddie Ducey.

Q Was he the operator?

A Yes, sir.

Q What work did you tell Mr. Ducey was to be done that day?

A To turn the wire end for end, check the bucket.

Q When you say turn the wire end for end, are you referring to the closing cable wire?

A Yes, sir.

Q Was this an experienced crew with Mr. Ducey?

A Yes, sir.

Q Had they done that operation many times before?

A Yes, sir.

Q Did you have to give them any detailed instructions as to what they were to do?

A No, sir.

MR. DANAHAR: Your Honor, I object to the leading of the witness.

THE COURT: Well, I would say the objection is overruled. The answer will stand.

Next question.

Q After you told Mr. Ducey what the work was to be that day what did you then do, you personally?

A Me personally? I went upstairs and started working on reports.

Q When you say you went upstairs and started working on reports, where upstairs?

A In my office.

Q You have an office on board the dredge?

A I did, yes, sir.

Q Where was that located?

A On the after end on the starboard side, just above the galley.

Q On the after end, that is at the back, on the starboard side, that's the right-hand side; is that correct?

A Right-hand facing the bow, yes, sir.

Q And did you remain in your office until some incident occurred morning?

A Yes, I did.

Q What incident happened? What happened to take you out of the office?

A Mr. Bruce Anderson came and told me that his brother had been hurt.

Q Can you fix for us approximately the time it was that Bruce Anderson came to your office and told you that his brother -- and by his brother we mean Michael here; is that right?

A That's right.

Q Can you fix for us approximately the time that Bruce Anderson came to your office and told you that Michael was hurt?

A Sometime between 10:00 and 11:00 o'clock.

Q When you received that report from Bruce, if I may, what did you do?

A I immediately went up in the cab.

Q Was Michael Anderson in the cab at that time?

A He was.

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Q When you got there?

A He was.

Q What did you do in connection with Michael Anderson?

A I was going to find out whether he had been -- what was the matter with him, and when I saw the man was in pain I then decided the best thing to do was get him ashore.

Q Was Michael Anderson sent ashore?

A He was.

Q Now, by the way, did Michael Anderson go ashore alone or with someone else?

A No, Bruce went with him, his brother.

Q And the rest of the men remained on the dredge; is that correct?

A Yes, sir.

Q After Michael Anderson went ashore with his brother Bruce was the operation of reversing the cable end for end completed?

A Yes, sir.

Q Were you part of the completion of that operation?

A Yes, sir.

Q What did you do in connection with completing the reversal of the cable end for end?

MR. DANAHAR: Objection, your Honor.

THE COURT: On what ground, Mr.Danahar?

MR. DANAHAR: On the ground that this is something that took place after the accident, and what he did or what anybody else did really has no bearing on the case.

THE COURT: Mr. Cohen, what do you say?

MR. COHEN: I would say, your Honor, that I would hope to establish from this witness that he operated --

MR. DANAHAR: Excuse me, your Honor.

MR. COHEN: Well, if Mr. Danahar --

THE COURT: No, no.

MR. COHEN: May we do it at the side bar, your Honor, on a offer of proof?

THE COURT: All right. Come on up with the court reporter.

[At the side bar]

MR. COHEN: Your Honor, I expect to show that he operated the same tugger winch that the plaintiff had been operating. I expect to show the manner in which he operated it, which was altogether different than the plaintiff says he was operating it. I expect to show that he had no trouble or difficulty handling that tugger winch all by himself, and that he completed the operation using the tugger winch all alone.

I believe in view of the nature of the claim

being made here that I have a right to develop that.

MR. DANAHAR: First of all, your Honor, it has been developed to some extent in the deposition that was read before, the last few questions that was read by Mr. Cohen.

THE COURT: From the deposition --

MR. DANAHAR: From the deposition this subject matter was gone into and it was developed that he handled it alone after the accident. And aside from that, what he did after the accident you have to establish that everything, all the circumstances were exactly the same as when the accident happened before any such evidence would be admissible.

THE COURT: Well, suppose he does establish it, then what do you say?

MR. DANAHAR: I still say that just because he operated it alone really doesn't mean a thing. He could be taking a chance by doing it alone.

THE COURT: Or his superior knowledge and his greater --

MR. DANAHAR: His superior knowledge.

THE COURT: [continuing] greater ability would enable him, just as it would with a veteran Judge against a new Judge, or a veteran attorney against a new attorney.

MR. COHEN: It has probative value, that kind of testimony, thought, your Honor.

THE COURT: I am afraid I will have to reserve decision. I am not that smart that I can decide an issue of that importance by itself. There should have been a memo handed to the Court really in advance of the trial saying this issue will come up and we maintain that the Captain should be allowed to testify with regard to how he operated this particular tugger winch, and so forth.

Now, gentlemen, I cannot be certain that I can make a ruling without reflecting on it and without having a chance to examine what the authorities have to say. You have not given me any authorities other than what appeals to you on a common sense basis.

Now, is there anything else of the Captain that you wish to elicit other than that?

MR. COHEN: Yes. I would like to elicit from him his experience in operating this very winch. Now, Mr. Danahar had an expert on the stand who never operated this winch and told us about how winches should be operated. I can show that he operated it on this occasion and on others.

THE COURT: Well, forget this occasion. Wouldn't he have a right, for the sake of argument, just forget it

for the moment, wouldn't he have a right to show that this witness did operate that same winch on another occasion with the same objective in mind? There has been a lot of testimony on the operation of this type of winch in the cab body to perfect or to achieve the objective that it was present on the day of the accident. You yourself have introduced testimony along that line.

We have asked the plaintiff whether he did this same sort of thing many times before, and I think he went into a large number of occasions that he had done the identifical thing. Now, why can't we have the Captain tell us what he did with this winch on other occasions and how it operated when he undertook to do it and the same objective was involved?

MR. DANAHAR: Well, we would have to establish that it was under exactly the same circumstances.

THE COURT: What do you mean, same circumstances? It is the same winch and same place --

MR. DANAHAR: Same conditions, same place, same winch, same wire. Many factors that would have to be proved, you know. It would have to be exactly the same conditions under which Mr. Anderson operated it. All those facts would have to be proven. And even then I say I don't think it is material what he did on prior occasions and had no accident.

THE COURT: Well, is there anything further that you want to elicit from this witness?

MR. COHEN: Yes, the right and the wrong way to operate a tugger winch.

THE COURT: All right. Then I am afraid I am going to have to reflect on it, gentlemen. And there is another thing that I wish you had thought about that would really have helped me by way of a memo.

MR. COHEN: May I say this, your Honor --

THE COURT: Yes.

MR. COHEN: [continuing] there already is in the record of this case testimony that Capt. De Graff operated the winch after the accident and finished the operation. What I want to do really is to have him show us, as other witnesses have shown us --

THE COURT: How he did it?

MR. COHEN: How he did it. I have the jury wheel that we have been using down there, Judge, I want the opportunity to make the same kind of demonstration with him that Mr. Danahar made with the plaintiff, and I don't understand this objection. It never struck me that there could be any objection to something like this.

MR. DANAHAR: I didn't make any demonstration with the plaintiff. You did all the demonstrating with the

plaintiff. But that's beside the point. Your Honor, as you know after an accident occurs people are more careful. They act differently. And this captain operated this winch after this accident. Naturally he would be extremely more cautious.

THE COURT: Well, that is something for the jury to take into consideration.

MR. DANAHAR: That's why it shouldn't even be considered, your Honor.

MR. COHEN: That only goes to the weight. He can argue that to the jury. It doesn't go to the admissibility of what I am proposing to do, your Honor.

THE COURT: Yes. Could you take the Captain off for the time being and put on somebody else and give me a chance to think about it?

MR. COHEN: Yes.

THE COURT: Are you going to call Capt. Wheeler?

MR. COHEN: Yes, sir.

THE COURT: Why don't you call Capt. Wheeler and have this captain presently on the stand step down and let me try to find a solution.

MR. COHEN: All right.

THE COURT: Thank you.

[In open court - jury present]

THE COURT: All right, Mr. Cohen. Proceed.

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MR. COHEN: I am sorry, I thought we were going to have Capt. De Graff --

THE COURT: You were going to tell them. He is your witness.

MR. COHEN: I thought the Court would tell them.

THE COURT: All right. Step down, Captain, and remain outside until we call you back.

[Witness temporarily excused]

THE COURT: All right, next witness.

MR. COHEN: Capt. Wheeler.

W I L L I A M W H E E L E R, called as a witness by the defendant, being first duly sworn, testified as follows:

THE COURT: Capt. Wheeler, you have heard me say many times to witnesses in this courtroom in your hearing in this case that they are to speak up and so forth; is that right?

THE WITNESS: Yes, your Honor.

THE COURT: I don't have to repeat that, do I?

THE WITNESS: No, sir.

THE COURT: All right.

DIRECT EXAMINATION

BY MR. COHEN:

Q Capt. Wheeler, at my request you have been

sitting here in attendance with me on the trial of this lawsuit; is that correct?

A Yes, sir, I have.

Q Can you tell us, Capt. Wheeler, what your maritime education, experience and training has been?

A Yes, sir. In 1935, after graduating high school I went to sea as an ordinary seaman. In 1936 I came ashore, I worked as a rigger in construction.

In 1938 I was enrolled in the Maritime Commission's Cadet Training Program and I was graduated from that course of training in 1942. Early in --

Q Excuse me. Is that Kings Point you are talking about?

A It's now known as Kings Point, yes, sir. The U.S. Merchant Marine Academy.

I was graduated from that course of training in early '42 and I went to sea as a third officer. Served for about a year and a half as third officer on freight ships, cargo ships, qualified, passed the examination as second officer.

After about a year as a second officer I qualified and passed the examination as chief officer.

A year and a half as chief officer and I finally, in 1945, obtained my master's license.

I sailed as master on American Flag freight ships

until 1948 when I reverted back to chief mate.

In 1950 I was called to active duty with the Navy, served in Korea.

In the end of '52 I was returned to merchant shipping, and early in '53 I came ashore and I worked as stevedoring superintendent here in the Port of New York until 1954 when I went back to sea again as master.

At the end of '54 I came ashore again into my present activity as a marine surveyor and a marine consultant.

In 1959 I was involved with the formation of the Universal Cargo Gear Survey & Certification Bureau, and we were accredited by the U.S. Coast Guard and the U.S. Department of Labor to inspect and to issue certifications as per the regulations on vessels on the hoisting and cargo working equipment of vessels, including dredges.

I have served as a surveyor and issued certification for the equipment on dredges on Lake Erie, Erie Sands Steamship Company. On other occasions I have certified, inspected, examined and tested Clyde whirleys, which is the type of mechanism on Dredge 50.

I have also certified and inspected many other types of cranes.

Q Now, in the course of your years in the maritime field you have had experience, have you, with various kinds

of winches and wire ropes?

A Yes, sir, I have.

Q Are you familiar with the kind of tugger winch shown in this photograph, Defendant's Exhibit A-2 [handing]?

A Yes, sir.

Q Can you describe that kind of which for us, please?

A This is a winch mechanism, hoisting or pulling, source of power that is available in the cab of this crane, and it is powered by compressed air. It is an air motor. It works from compressed air very similar to a steam winch, to a winch that works from steam under pressure.

It consists of basically a drum on an axle, a shaft. On that shaft also is the compressed air motor that is attached to the compressor in the after end of that cab. And it works by revolving, by the motor revolving the shaft and the drum and the wire is led to the drum perpendicular, or approximately perpendicular to the axis of the drum, and it is allowed to spool onto the drum. A free spooling drum.

The wire spools onto the drum at random within the confines, the ten inch confines of the flanges of that drum.

Q When you say within the confines of the ten inch flanges of that drum, do you mean that if this jury wheel reflects the drum at the perimeter of it there are uprights, the pieces of metal that you call flanges that will

accommodate and hold in the wire that is put on the drum? Is that correct?

A That's right. Yes.

MR. DANAHAR: Your Honor, I object to leading the witness.

THE COURT: Yes, watch that. But there wasn't too much harm done because the witness had already said that.

Q Do those flanges show up in this photograph, Exhibit A-2 in evidence?

A Yes. One of them is visible in that photograph.

MR. COHEN: May we have the one flange that is visible marked in red, your Honor?

THE COURT: Well, let the witness mark it. Put your initials there, sir.

THE WITNESS: Yes, sir.

MR. COHEN: Mark it with his initials, your Honor?

THE COURT: Yes.

THE WITNESS: The right-hand flange as one faces the winch is visible. I will point an arrow towards it, and it's recessed within the framework of the supporting structure around the drum. My initials are "WFW."

MR. COHEN: Thank you.

Q Now, is this type of tugger winch and drum and flanges any different in principle than the kind of winches

on cargo vessels that call here in the Port of New York?

A In principle it's very similar.

Q You said that this drum on the tugger winch was free spooling, I think was the term you used?

A Yes, sir, it is.

Q Can you explain to us, please, what free spooling means?

A It means that the wire, the wire rope that is spooled onto that drum is free to spool, it's a smooth surfaced drum. The wire rope is free to spool on that drum anywhere as directed by the lead block through which the same wire runs in a random fashion. It doesn't have to be exactly one alongside the other. As opposed to a grooved drum which is also visible in some of these photographs, the wire depicting, or displaying the big wire that's in that winch -- in the crane. That's a grooved drum. There the wire has to be precisely --

MR. DANAHAR: Your Honor, I move to strike out all of this.

THE COURT: Yes, objection is sustained. You are making a whole recitation and you were not asked that. You have been in the courtroom. You are not here to comment on the testimony.

What was the question, Mr. Court Reporter, please,

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that brought on all this?

[Question was read]

THE COURT: All right, so you did already. Your answer was finished a long time ago. Please continue.

Q Are the winches on cargo ships that come into the Port of New York also freewheeling winches?

MR. DANAHAR: Objection, your Honor. We are not interested in --

THE COURT: I am going to insist that we do not go into that any further. You yourself were satisfied with the general explanation that was made by Capt. Ash, it was pointed out quite clearly that they do not help us with regard to this particular piece of machinery with which we are concerned. The contrast was clearly demonstrated, and I don't want to spend time on a thing like that.

MR. COHEN: If your Honor please, that was Capt. Ash's testimony we disputed, and I have Capt. Wheeler here to testify about his observation.

THE COURT: No, sir. You are going to have him tell this jury that the other type of equipment with all the extras that it has on it has a bearing as to this?

MR. COHEN: I am going to ask him if that equipment has the extras on it that Capt. Ash testified to, yes, sir.

THE COURT: Oh, I see.

MR. COHEN: Yes, sir.

THE COURT: Go ahead.

MR. COHEN: May I have my question read back by the reporter?

THE COURT: Yes, please, Mr. Reporter.

[Pending question was read]

MR. DANAHAR: I press my objection, your Honor, to that question. It is general.

THE COURT: I am inclined to agree with you. I am inclined to agree with you. I don't see how that is helpful. You are supposed to show a comparison of other equipment with the one in question in order to show why it is that the piece of equipment in question had to be operated in the fashion that it was operated.

You can't compare the efficiency, the ability to perform and all the rest of it between these different pieces of mechanism. That is the point I have been making.

I am going to sustain the objection.

Q Capt. Wheeler, I believe you said that part of your work experience was that of a stevedoring superintendent; is that correct?

A That's right.

Q For what company was that?

A John W. McGrath Corporation.

Q What does a stevedoring superintendent do?

A He lays out the work and oversees the work and directs the work and chooses the equipment to do the work and follows through on all the work, all phases of the operation of loading or discharging cargo into or out of the vessel.

Q In connection with that kind of work are winches used?

A Yes, sir.

Q The kind of cargo winches that you have seen used in that type of work, in your experience as a stevedoring superintendent in the Port of New York, are those winches in any material respect different from the kind of winch and drum we see in this tugger winch shown in Exhibit A-2?

A The drums of both kinds of winches are --

THE COURT: Can't you say yes or no, please? What is the answer?

A They are no different.

THE COURT: You have testified over and over again, haven't you, sir?

THE WITNESS: I have, yes, sir.

THE COURT: All right. Then by this time you should know that you invite trouble if you go beyond what

you are asked.

THE WITNESS: Yes, sir.

Q Tell us, Captain, on the basis of your experience how many men operate a winch in the Port of New York?

A One man --

MR. DANAHAR: Objection, your Honor.

THE COURT: The objection is sustained.

MR. DANAHAR: And I move that the answer be stricken.

THE COURT: The answer is stricken, and the jury will disregard it.

Q Capt. Wheeler, in taking line up onto the drum of a winch such as this tugger winch shown in Exhibit A-2, is a fairlead important?

A Yes, sir, it is.

Q And can you explain, please, to the jury and the Court just what is meant by a fairlead?

A The fairlead is the rolling device, or shiv next, immediately before the wire touches the winch drum. The object through which the wire is led to the winch drum. That's the lead, or the fairlead.

Q And whose job, or duty is it to see that there is a fairlead onto the drum of the winch?

A The operator of the winch.

Q What is the effect if the operator of the winch

neglects to make sure there is a fairlead? What happens?

A You could have inadequate spooling onto the drum.

Q In taking up cable onto the drum of a winch such as this tugger winch, is it important to have it come on evenly?

A Evenly, reasonably evenly, yes, it is.

Q And in a freewheeling -- is it freewheeling or free spooling?

A Free spooling.

Q In a free spooling winch of this type how is it accomplished that the line comes on fairly evenly?

A By the location of the fairlead, or the lead block. The distance of the lead block from the drum is important, and the location of the lead block is important to establish a fairlead.

Q Could you please explain to us how the location of the fairlead is related to the even spooling on the drum?

A The distance, the number of feet from the drum to the first fairlead, in this case four or five feet for a half inch wire, it gives that length of wire four or five feet, enough freedom to spool itself to allow itself to be spooled onto the drum reasonably evenly if the drum is rotated.

Q Capt. Wheeler, you were here and you heard

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Capt. Ash testify, did you not?

A Yes, sir, I did.

Q In your experience in the Port of New York, both as a stevedoring superintendent and as a marine surveyor and consultant, and as a master and officer on ships, have you seen cargo winches containing the type of mechanical fingering device that Capt. Ash testified to resemble the device on a fishing reel?

A No, sir, I have never seen it under --

THE COURT: No, sir.

A No, sir.

Q Now, Capt. Wheeler, are you familiar with the operation of using a tugger winch such as shown in Exhibit A-2 to reverse the holding cable on a dredge?

A Yes, sir.

Q And based upon your experience, sir, how many men are needed to perform that operation?

MR. DANAHAR: Objection, your Honor. He hasn't said he has any experience with the tugger winch, he just said he has some familiarity with the tugger winch.

THE COURT: What do you say, Mr. Cohen?

MR. COHEN: I believe he has testified that he is a licensed master of all vessels --

THE COURT: Well then, ask him and cure the defect.

I will sustain the objection at this time.

Q Do you have a license, Captain?

A Yes, sir, I do.

Q Who issued the license to you?

A The United States Coast Guard.

Q What kind of a license is it?

A Master's license, any waters, any tonnage.

Q Same kind of license Capt. Ash said he had?

A Yes, same kind.

Q And you would be qualified to serve as a master in any type of vessel, any water?

A Yes, sir.

Q Tell me, Captain, in your opinion --

THE COURT: Ask about his personal experience with regard to the particular subject matter that you are going to then address your question to.

Q I believe you said you had experience in going aboard dreges and certifying the gear and equipment on them?

A Yes, sir, I have.

THE COURT: Did that include --?

Q Did that involve operating the equipment?

A Yes, sir, it did.

Q And did that include winches like this tugger winch?

A Yes, sir, it did.

Q Now, Captain, based upon your experience, can you tell us, do you have an opinion as to how many men are required to operate a tugger winch of this sort?

A One man. One hand.

Q I would like you to assume please that this jury wheel represents the drum of the tugger winch in question and that the entire winch is twenty-two inches wide, as the marking on this table indicates, and that the handle to that tugger winch is on the right-hand side as we face it, and that this cord represents the line to be taken on.

Would you please --

MR. COHEN: If I may, your Honor --

Q [continuing] step down and show to us where you say the man who is to operate the tugger winch should position himself for that work.

A The line leads from the tugger winch drum to a lead block in this direction [indicating]. If the control is on this side, on the right-hand side of the drum as I face it, he should be on this side of this wire and manage the control from this position, or a position on this side of the wire [indicating].

MR. COHEN: May I ask him a few questions while he is still here, your Honor?

THE COURT: Yes.

Q If the operator stands on the side that you are indicating, which would be on the right-hand side of the winch where the handle is located, would any part of his body be passing over the moving wire cable?

A No, it would not.

Q If a man should be operating that winch from the other side, which would be the left-hand side, then would any part of his body be over the moving wire cable?

MR. DANAHAR: Objection, your Honor.

THE COURT: Objection overruled.

A In this position, any position on this side --

THE COURT: Can you answer yes or no? Will you read the pending question, please, Mr. Court Reporter.

[Pending question was read]

A Yes, it would.

THE COURT: Next question.

Q Now, is it good safety practice for a man to operate a winch and permit his body to be over a moving wire cable?

MR. DANAHAR: Objection, your Honor.

THE COURT: Overruled.

A It is not good safety practice.

Q Why is it not --

MR. COHEN: May I have the witness go back to

the stand now, your Honor?

THE COURT: Yes.

Q Why is it not good safety practice?

A Because if any other -- any unexpected motion takes place, or anything, any unexpected forces enter into the picture, he could be knocked off balance and fall onto the moving wire and be dragged into the revolving drum.

Q Captain, is it necessary in operating a tugger winch of this sort where the winch is being used to take the cable back onto itself, is it necessary for the winch operator to be tapping the wire rope, the wire cable to assist its spooling on?

MR. DAMAHAR: Objection, your Honor.

THE COURT: Objection overruled.

A It's not necessary.

MR. DAMAHAR: It depends upon the day, the circumstances.

THE COURT: That you can develop on cross. He is allowed to answer it in a general way on direct.

Q Is it good safety practice for a man operating a winch to physically touch with his hand the moving wire cable that is going into and onto the winch?

A It is not good safety practice.

Q Captain, if in the course of operating a winch

such as this tugger winch the turns as they come on should not come on evenly, but should pile up on one side or in the center, how should such a situation be handled by the operator?

A Stop the winch and change the lead.

Q And then do what?

A Proceed to heave the wire in. If necessary, back it off and then proceed to heave the wire in.

Q Captain, are you familiar with pinch bars?

A Yes, sir, I am.

Q Are pinch bars sometimes used by a winch operator to guide the wire evenly onto the drum?

A For a short period of time, yes.

Q What is the purpose of the operator using a pinch bar?

A So that his hand does not touch the wire.

MR. COHEN: I have nothing further, your Honor.

THE COURT: All right. Cross-examination, Mr. Danahar, please.

CROSS-EXAMINATION

BY MR. DANAHAR:

Q Capt. Wheeler, did I understand you to say that there is no difference between a cargo winch on a merchant ship and this tugger winch that we have been talking about?

A I didn't say there was no difference.

Q Well, I made a note. I thought you said, there is no difference between a cargo winch and this tugger winch.

A I said in principle there is no difference between the drum of a cargo winch and the drum of this winch.

Q Well, by "principle" what do you mean? That they both go around?

A They both work on the same principle. They are both free spooling drums, and they both have adequately sized flanges to keep the wire on.

Q So by the flange you mean on each side of the drum there is a flange which will keep the wire from going off the end of the drum; is that what you mean?

A That's right.

Q That has nothing to do with whether or not the wire will wind evenly around the drum, does it?

A It does.

Q In what respect?

A It keeps the wire when it spools across the drum, it returns the wire, it reverses the direction of the spooling process back and forth across the drum. When it touches the flange it starts to come back again.

Q That's the only thing it accomplishes, it prevents the wire from going off the end of the drum and sends it

back in the other direction; isn't that right?

A It limits the size of the drum.

Q Wait. It prevents it from going off the drum and makes it start to move out in the opposite direction.

A That's right.

Q But as far as that wire winding unevenly after it starts to go back, that flange will not prevent it from winding around that drum unevenly, will it?

A It won't cause it one way or the other.

Q It will not have --

THE COURT: He asked you, would it prevent it.

A It would not prevent it, no.

THE COURT: Next question.

Q Now, the type of cargo winch that you have been referring to, they are much larger winches, aren't they?

A Yes, sir. Definitely.

THE COURT: Well, the answer is, yes, they are larger. All you have got to do is say so. That's all. They are larger, so the answer is yes.

THE WITNESS: Yes.

THE COURT: Next question.

Q And the wires on them are a lot heavier, aren't they?

A It depends on the capacity of the cargo winch

that you are referring to.

Q Well, I mean much larger than the tugger winch wire.

A On a two ton boom the drum would be about the same size.

Q A half inch wire?

A Three eighths of an inch or half inch wire, yes. A light rig.

Q Now, Captain, you mentioned something about a fairlead. Do you know whether or not a fairlead was being used on the day of this accident? Yes or no?

A Yes, I know. If --

THE COURT: No. Yes or no.

THE WITNESS: May I ask a question of the Court?

THE COURT: No. No.

THE WITNESS: All right. No, sir. I don't, no.

THE COURT: Don't become an advocate, will you?

THE WITNESS: I won't.

Q You were not present so that you couldn't possibly know, could you?

A That's right.

Q I show you Plaintiff's Exhibit 2-F [handing]. Now, that shows the tugger winch, doesn't it?

A Yes, sir, it does.

Q It also shows the tugger winch wire?

A Yes, it does.

Q And it also shows the tugger winch wire is slack on the deck in front of the tugger winch, doesn't it?

A Yes, it does.

MR. COHEN: May I, your Honor? I hate to interrupt on cross-examination, but may I rise because of the inferences creating to state that these pictures were not taken on the day of the accident. I think --

MR. DANAHAR: Oh, I am not --

MR. COHEN: I asked Mr. Danahar to so stipulate.

THE COURT: He didn't say anything to bring that on at all. He asked him whether that particular photograph reflects thus and so.

MR. COHEN: All right.

THE COURT: That is all he asked. When he asks anything that comes within the area that you think is offensive, then you get up and object. You are premature.

Q Can you tell whether from that photograph, whether or not that wire is running through a fairlead?

A It does. The photograph does not give any indication, no.

Q Now let us assume that with the tugger winch and the tugger wire slackened off like that it was put into

operation. As the spool started to turn and as the wire started to turn around the spool, do you say that that wire could go onto that spool evenly without somebody handling that wire in that slack condition?

THE COURT: Hold it now.

MR. COHEN: If your Honor please, this is what I was afraid of. There was no --

THE COURT: Never use the word "afraid."

MR. COHEN: I am sorry. I didn't mean it. But there is no testimony in this case that the condition shown on this photograph --

THE COURT: Did you hear counsel say "assume"?

MR. COHEN: Yes, but I don't believe he can ask opinion testimony based on an assumption, your Honor.

THE COURT: I have to interrupt you. The objection is overruled. Let's have the question clear so the jury knows what we are going to do. I will overrule your objection. He said "assume" and he said that very clearly and he is talking to an expert, and let's have his answer.

What is the question, Mr. Court Reporter, please?

[Pending question was read]

THE COURT: What is your answer?

A As it's displayed in the photograph.

THE COURT: As it is displayed in the photograph?

MR. DANAHAR: Yes, sir.

THE COURT: Referring to the photograph marked --

MR. DANAHAR: Plaintiff's Exhibit 2-F.

A There was no lead block, so it would go on loosely and at random, as it is displayed in that photograph.

Q I thought you just said that you can't tell whether there is a lead block.

A That's what I just said. I can't see if there is a lead block -- if it was led through a lead block it would go on reasonably evenly.

THE COURT: Do you need that photograph for your question? I don't see it. You asked him whether or not with that kind of drum, etc., and with the slack in the coil, and so forth. You don't need to concentrate on a picture, do you? Ask him the general question as to whether or not the operator would have to handle the wire if it were slack. Isn't that what you are after?

MR. DANAHAR: Well, it is in one sense, your Honor.

THE COURT: All right. Well, go ahead, do it your way. I don't want to --

MR. DANAHAR: Well, I thought he said before something else, so I would like to develop that.

THE COURT: Go ahead.

Q Do you say that there is no lead block here or

that you can't see any lead block?

A I said I can't see a lead block in that photograph.

THE COURT: He said that. He said that.

MR. DANAHAR: All right, your Honor.

Q Now my question to you is: Assuming there is a lead block there, and assuming the wire is slack like it is shown in this photograph, do you say that when you started up that tugger winch that the first few turns would wind on that spool evenly?

A Reasonably evenly. Not precisely evenly, but reasonably evenly. It's a free spooling drum.

Q Wouldn't it be important to guide that wire for the first few turns so that it would be even better than reasonably even? To make sure that it's going on there evenly?

A It's not important.

THE COURT: Well, suppose it is not important, but the operator wanted to do a precise job?

THE WITNESS: Fine.

THE COURT: That happens, doesn't it?

THE WITNESS: Yes, sir, it does.

THE COURT: We are not going to flay him because he wants to do it closer to perfection?

THE WITNESS: That's right, sir.

THE COURT: All right. Now, suppose he has that kind of objective in mind and undertook to do that, then would he not have to hold the wire for a while while it was slack?

THE WITNESS: Not while the winch is running, stop the winch, adjust the wires to his desires.

THE COURT: All right. That's his answer.

Q But you stopped the winch, and how do you adjust the wire when you stop the --

A It's slack. You said it's slack. Slide it in, take your hand off it.

Q Then assume you have additional slack to take up.

A Right.

Q Then what do you do?

A Stop it again. Realign it. If you wish to have it perfect.

Q You would have to stop and start this thing continuously; is that correct?

A If you wished for perfection, yes.

Q Not perfection, better than reasonable.

A I said reasonable.

Q Better than reasonable.

A Well, to me it's either satisfactory or unsatisfactory.

Q Well, do you blame a crew member for acting a little more than reasonably?

MR. COHEN: I object to that, your Honor.

THE COURT: Objection overruled.

A That's a matter of degree.

THE COURT: No. Do you blame, that's all he asked.

A No. If he wanted to be precise, a little more seaman-like, I would give him credit for it.

THE COURT: Do you want the answer stricken?

MR. COHEN: No, I objected to the question.

THE COURT: I asked you if you wanted the answer stricken?

MR. COHEN: No.

Q Now, this fairlead that you referred to, do you say that -- well, referring to Plaintiff's Exhibit 2-F again, where would the fairlead be placed? Would you indicate that, please [handing].

THE COURT: Would you mark that, Capt. Wheeler, "FL"?

THE WITNESS: Yes, sir. I can't actually see that area on this photo.

THE COURT: So you can't really mark it.

THE WITNESS: No.

THE COURT: All right. He can't see that area

and, therefore, he doesn't feel he can mark anything in that respect.

Q I will show you Plaintiff's Exhibit 2-D. Can you see an area there where you would place a fairlead [handing]?

A This is the area where the fairlead --

THE COURT: The answer is, yes.

THE WITNESS: Yes. Sorry.

Q Would you indicate where you would place the fairlead?

THE COURT: Put "FL" on it.

THE WITNESS: "FL" with an arrow.

Q Yes.

THE WITNESS: In the photograph, if I may --

THE COURT: No. Please, Captain, you are likely to say something that will start this trial all over again, and I am not doing it because you want to say something. I have had enough.

MR. DANAHAR: May I have a minute, your Honor?

THE COURT: Yes.

Q Referring to Defendant's Exhibit A-2, that shows this tugger winch, doesn't it [handing]?

A Yes, sir, it does.

Q And in what condition is the wire wound around the spool of the tugger winch as shown in that photograph?

A Reasonably even.

Q Is it as even as you would want it to be?

A It's satisfactory.

Q If you were supervising this job and inspecting it?

A Yes, it's satisfactory.

Q Aren't there some parts of that wire that overlap each other?

A There has to be.

Q And are separated?

A There has to be.

Q Aren't they supposed to be close together?

A No, not at all. This is a free spooling drum.

Q What do you mean by free spooling drum?

A That the wire spools onto the drum freely within the limits of the width of the drum as governed by the lead, the fleeting distance and the fleeting angle. This is all engineered and designed into the winch.

MR. DAMAHAR: I move to strike out that part of the answer which is not responsive about the engineering and designing and everything else.

MR. COHEN: I think it is all responsive to the question, your Honor.

THE COURT: The motion is denied. The answer stands.

Q When you wind the wire around the drum, isn't each strand supposed to line-up against the next strand?

A Not on a free spooling drum. On a grooved drum, yes.

Q Well, why not on a free spooling drum?

A Because the free spooling drum is used to handle, or to spool on and off a slack wire. A grooved drum is always under load. There is never time when the grooved wire is slack.

Q But in this particular case we had a drum that was under load, too.

A A free spooling drum under load.

Q And under a heavy load wouldn't you say so?

A I don't know.

Q Well, you know what the load was, don't you? You have been sitting here for three or four days and you have heard all the testimony going on here?

A It was only pulling the weight of the cable itself.

Q Weight of a closing wire cable.

A Yes, a relatively light load.

Q A one and a half inch cable.

A Right. Two pounds a foot.

Q And this cable was 400 feet long.

A Right. The whole cable, if you lifted it all up

together, would weigh about 800 pounds. But you don't lift it all up together, you only reeve it up and over.

Q Assuming that a fairlead is in position and being used on this tugger winch, is it possible that the wire will not spool around the drum unevenly?

A Loaded or unloaded?

Q Under the circumstances in this case which you are familiar with.

A It would not spool under -- around the drum unevenly. I would expect it if it goes through a proper lead to spool on reasonably evenly.

Q My question to you, is it possible that it wouldn't, particularly in the beginning of the operation when the wire is slack?

A It might be a little more uneven than it was when it's loaded, but it would still be within the limits of satisfaction.

Q And if it was a little more uneven would it be improper for the operator of the tug to try to make it more even? In your opinion.

A He can do that, yes. He can --

THE COURT: No, would it be improper for him to --

Q Would it be improper for him to try and guide it --

A No.

THE COURT: The answer is no.

A It would not.

Q You gave a demonstration here before, and you said that if the operator of the tugger winch stood on the left side of the wire and the ship lurched he could fall into the drum; is that right?

A That's possible.

Q Isn't it also possible that if he were standing on the right side and the ship lurched he could fall into the drum?

A It would be possible, too.

Q So whether he stood on the left or right side doesn't make any difference, does it? Assuming the ship lurched.

A Only as regards lurching of the vessel. But other forces are at work where he might slip on the --

Q I am talking about lurching which is what you testified about.

THE COURT: But you got your answer. You got your answer, so you asked another question which has the same objective, and that brings on a lot of discussion. What do we need it for?

Q You say you only need one man to operate this particular tugger winch; is that correct?

A That's my opinion, yes, sir.

Q And by that you mean you only need one man to handle the lever; is that correct?

A That's right. And to decide which direction and how fast.

Q Yes. By the way, how does this lever operate, do you know?

A It's a compressed air control.

Q Excuse me. I didn't really mean that. Do you push it forward, do you pull it back toward you, do you go to the left or do you go to the right?

A In installations of this type the control would be forward and aft. Forward to heave, aft for slack.

Q And by heave you mean pulling up?

A Heave ahead, slack off.

Q And by slack you mean letting the wire go out?

A Right.

Q Referring now to Defendant's Exhibit A-2, I notice there is a bar of some kind in front of the tugger winch there; do you see what I am referring to [handing]?

A Yes.

Q What is that bar?

A That's a brake bar. When you flip it over in front of the drum it applies a brake shoe to the drum.

Q What is the effect of the brake?

A It locks the drum. Like your brake on your car.

Q In position that's shown in this exhibit it's over on the right side?

A The brake is released.

Q I see. Why do you need a brake on a winch of this type?

A Because if you have air pressure you can hold your load, but if you have a load on the wire and then you wanted to shut off your compressor and you still want to hold the load, you can set the brake.

Q Are there any other reasons?

A That's the reason. This brake will not hold the load against the air pressure. If you apply pressure it will rotate that against the brake.

Q Suppose something should go wrong with the control and you wanted to shut off the winch?

MR. COHEN: If your Honor please, I think we are getting very remote and speculative. There is no basis in the record for this kind of assumption.

THE COURT: The objection is overruled. Go ahead, finish your question.

Q If something went wrong with the lever, the control, and you couldn't shut the winch, you would want to use that

brake, I assume?

A That's right.

Q Well now, do you say that there should be only one man at this machine to handle this lever, and then if something should go wrong, to handle this brake?

A Absolutely. He flips that brake --

THE COURT: Absolutely. You can't improve on that. That is your testimony. It is up to the jury to evalute it, either to accept it, reject it, or do whatever they want with it. But you can't go any further than that.

Go ahead. Next question.

Q Is this a friction type brake?

A Yes.

Q In other words, the more force you apply to it the more it reacts and accomplishes its purpose; right?

A Again, it's designed so that the weight of the bar will apply sufficient force to the brake to hold the load.

Q You mean all you have to do is throw it over?

A Flip it over, that's right.

Q And it will shut the winch off?

A I didn't say that. If the power, the compressed air is off or has failed for whatever reason, you flip the brake over, it should hold the load.

Q In other words, the winch will stop?

camds 402 Wheeler - cross

A Yes. You don't have any air power, compressed air on it, if will stop the winch.

Q Now, Capt. Wheeler, you know from being here all this week that in connection with this accident there was only one man assigned to this job up in the cab; is that right?

A That's right.

Q Referring to Plaintiff's Exhibit 1, would you take a look at that [handing]?

A Yes.

Q You also know that from the testimony there is only one way to look out on deck from that cab where that tugger winch is located; isn't that so?

A I don't know that, no.

Q The forward deck.

A There is no way to look out directly on the forward deck. This is my understanding from what I heard.

Q Didn't you hear there is a door over on the port side where a signalman could stand and did stand at times to look out on deck to see what was going on and to signal the operator? Didn't you hear such testimony?

A Yes, when it was necessary. Yes, I did but that door gave a view of the port side.

Q The forward part of the dredge, didn't it?

A The door is at the forward part of the cab, and if you look through the door you see out through the port side.

Q The entrance to the door is on the forward part of the cab, isn't it?

A No, it's on the side of the cab.

Q Well, would you take a look in that photograph and do you still say that?

A Is this the door you are talking about [indicating]? Is this the door? There is the doorway right there [indicating]? On the side?

Q No.

A You said it was on the port side.

Q I am looking at the --

MR. DANAHAR: If I may point out to him, your Honor?

THE COURT: Yes.

Q Do you see that letter D there?

A Yes.

Q That "D" was marked by a witness as being the door that you could look forward at.

A I see that now. I thought you said door on the port side. Okay.

Q Well, that door that's marked "D" is on the port side. Port forward side.

A Okay.

Q Now, if a man were standing at that tugger winch in front of the control would it be possible for him to look out on deck to see what was going on?

A Not from a position he controls, no.

Q And in an operation of this kind that was going on wouldn't it be important that the operator of the tugger be in a position to know what is going on out on deck?

A Not necessarily.

Q Would it be important for him to be in a position to get some instructions or signals from somebody as to what was going on out on deck at the time that he was operating this winch?

A It would be important that he would know when to --

Q Now wait. Just answer that question yes or no, please.

MR. COHEN: May he be given a chance to answer the question in his way, your Honor?

MR. DANAHAR: My question could be answered with a yes or no, your Honor.

THE COURT: Let's hear the question, Mr. Court Reporter, please.

[The pending question was read]

THE COURT: Now Captain, I must say that is

capable of a yes or no answer. Can you answer it?

THE WITNESS: Yes, sir. The answer is yes.

Q Under the facts of this case as you know them from what you have heard, we had Mr. Anderson in this cab all by himself; he was pulling this closing wire cable up from the scow, which was attached to the tugger winch wire; he was operating the tugger winch wire; wouldn't it be most important that some method be provided so that he would know when to either stop or start or slow down this tugger winch?

A Yes. Some method.

Q And wouldn't the proper method be that somebody stand by that door that you have just referred to, and which is marked "D", to look out on deck to see what was going on, and if something did happen that it became necessary to stop the winch a signal could be given to that man, and then in turn to the operator of the tugger, Mr. Anderson?

A That would be not the only way of accomplishing the same purpose.

THE COURT: You know, you are arguing. You are now the advocate. What about the situation that he suggests? Is that possible?

THE WITNESS: It is possible, yes.

THE COURT: Next question.

Q Have you ever been in the inside of the cab where --

not this particular dredge, but any dredge -- where a tugger winch like that is located?

A Yes, sir.

Q Now, inside of that cab you have big drums, don't you?

A Yes.

Q As shown in Plaintiff's Exhibit A [handing]?

A Yes.

Q One is the closing wire drum, and the other is the holding wire drum; is that right?

A Yes, sir.

Q And you have a lot of machinery in there, don't you?

A Just enough to carry out the operation.

MR. DANAHAR: I think that is argumentative, too, your Honor.

THE COURT: Yes. Next question.

Q And you have generators in there, don't you?

A One.

Q And there is noise going on in there when you are operating the tugger winch, there is a certain amount of noise from that, isn't there?

A Some noise, yes.

Q And if the generator is operating there is noise

from that?

A Some noise, right.

Q And that noise would interfere from any signals you might -- any voice signals you might be attempting to receive from out on deck; isn't that possible?

A To some degree.

Q Do you say that it's never necessary to use a guide of some kind with respect to this tugger wire cable?

A The lead block is the --

Q Aside from the lead block.

A That's designed into it. You don't need anything else, because you have a proper lead.

Q My question is, do you say it is never necessary to use a guide except a lead block in connection with this tugger wire when it's in use with this tugger winch? Answer yes or no, please.

A I can't answer that yes or no. I mean, I can visualize circumstances where it might be advisable or practical to do it. I can visualize other circumstances where you wouldn't dare do it.

MR. DANAHAR: Your Honor, may we have a recess for a few minutes?

THE COURT: Of course. That is a reasonable request. The jury has been sitting hour after hour. I think

you are very fortunate, gentlemen. We have picked a remarkably concerned and careful jury and we are grateful to them. We don't want to abuse them. I know you don't and I don't.

Let us take a short recess. We will keep our promise to you about 6:00 o'clock.

[Recess]

[In the robing room - counsel present]

THE COURT: It is now ten past 5:00 and I want to keep my promise to the jury about 6:00 o'clock. We talked about this before and I can't see a way of accomplishing what you agreed to with regard to getting through today except for the medical testimony next Tuesday.

I am ruling that with regard to Capt. De Graff after further consideration I am convinced that he can testify as to operating that same drum under the same conditions in the same place on that day within a matter of minutes or so after the accident, and also that he has a right with regard to the operation of that same drum under the same conditions on other occasions, and that after further reflection seems to be supported by the law with the insistence, of course, that the same conditions be first established, a point that you made but which I don't think counsel is going to have too much difficulty with establishing in the light of asserting the first part of it.

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So we can call back Capt. De Graff and get through with him, and you said to me, sir, and I want the record to show this, that you said that that is the extent of your testimony from Capt. De Graff. Unless you are now going to change it.

MR. COHEN: No, I don't have too much, just his experience in operating that winch.

THE COURT: Then the answer is, that's it, Judge, isn't it? All right now, how much more time, Mr. Danahar, have you with Capt. Wheeler?

Off the record.

[Discussion off the record]

[In open court - jury present]

THE COURT: Would you mind completing the cross-examination, Mr. Danahar.

MR. DANAHAR: Yes, sir.

BY MR. DANAHAR:

Q Captain, can you tell me from your experience what causes fishhooks to develop in wire?

MR. COHEN: I am going to object to that question, if your Honor please.

THE COURT: Well, you yourself went into it with the distinct understanding that you were not consenting to it remaining, but it was all subject to your pending motion

to strike.

MR. COHEN: I have a motion before your Honor, yes. That is why I think it is improper to be gone into at this time.

THE COURT: Oh, you mean as a matter of --

MR. COHEN: Yes, sir.

THE COURT: [continuing] why is it improper?

MR. COHEN: May we talk to your Honor at the side bar?

THE COURT: All right. Come on up.

[At the side bar]

THE COURT: Yes, sir?

MR. COHEN: My motion to dismiss that type of testimony, or, to strike that type of testimony was --

THE COURT: I reserved decision and you knew I wasn't going to make the decision until next Tuesday.

MR. COHEN: But what I am saying is it was properly made at the end of the plaintiff's case, and if your Honor should rule when you make the decision, in my favor, nonetheless if he is permitted to ask this witness now about that type of a situation for which there is, I believe we can all agree, no affirmative testimony in this record, the damage would well have been done. It is a material issue that has not been developed in the defendant's part of

the case because there was no proof in the plaintiff's part of the case that such condition --

MR. DANAHAR: Your Honor, I'm not asking him whether there were fishhooks on this particular day. I just want to develop, you know, how fishhooks can develop in wire.

THE COURT: Well, you have got that established, haven't you, by your own direct testimony of Capt. Ash? Do you want to alter it any?

MR. DANAHAR: No.

THE COURT: Then leave it alone. If that is your purpose, I am going to sustain the objection.

MR. DANAHAR: Well, frankly, your Honor, I don't remember if I did.

THE COURT: You did indeed.

MR. DANAHAR: All right. I will withdraw the question.

THE COURT: Meticulously. All right. It is withdrawn.

[In open court]

THE COURT: Is there anything else, Mr. Danahar?

MR. DANAHAR: Just checking, your Honor.

THE COURT: Sure, check it out.

MR. DANAHAR: If I could just ask the Captain,

your Honor:

Q Could you describe this fairlead block that you referred to?

A A fairlead block is a single --

Q No, the one that you referred to that should be used in this particular operation, not any fairlead block.

THE COURT: In connection with this particular piece of equipment involved in this case?

MR. DANAHAR: Yes, your Honor. In connection with -- yes, exactly.

THE COURT: All right. Go ahead.

A It's a single shiv block to accommodate half inch wire, consisting of a shiv, two cheeks, a strap, a cross pin, an attachment, an attaching device so it can be shackled to a padeye in the deck.

MR. DANAHAR: All right.

THE COURT: Is that it?

MR. DANAHAR: That's it, your Honor.

THE COURT: Is there anything else, Mr. Cohen?

MR. COHEN: No, your Honor.

THE COURT: Step down, Capt. Wheeler.

[Witness excused]

THE COURT: Will you call back Capt. De Graff, Mr. Clerk, right away.

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GEORGE DE GRAFF, called as a witness by the defendant, having previously been sworn, testified further as follows:

DIRECT EXAMINATION [CONTINUED]

BY MR. COHEN:

Q Capt. De Graff, while Michael Anderson was being taken off the dredge to go ashore was any work being done?

A After he went ashore --

Q No, while he was being removed to go ashore?

A No.

Q After he was taken ashore did the work resume?

A Yes.

MR. DANAHAR: Your Honor, of course I have an objection to this, that is noted for the record.

THE COURT: Precisely. Your objection is overruled.

MR. DANAHAR: Thank you.

Q After Michael Anderson was taken ashore did the operation of reversing that closing cable wire continue?

A Yes, sir.

THE COURT: Putting it another way, after Anderson was taken ashore did you give, or did anybody in your behalf or to your knowledge give any order to countermand or to differ from the order that you had given before Anderson got hurt?

camds 414 De Graff - direct

THE WITNESS: No, sir.

THE COURT: Next question.

Q And when the operation continued, who operated the tugger winch?

A I did.

Q Now I would like you to assume, Captain, that this jury wheel here is the drum of the tugger winch; do you understand?

A Yes, sir.

Q And that as I stand now with my back to the jury, for which I apologize, I am facing toward the tugger winch.

A Yes, sir.

Q Forward. And the handle that controls the tugger winch is on the right-hand side, is it not?

A Yes, sir.

Q I would like you to assume further that this piece of rope, or string, represents the line that is being taken up on the tugger winch.

Would you please come down, if I may, your Honor, and show us where you stood when you operated the tugger winch following the accident to continue with that operation.

THE COURT: How long, Captain, after you were told about Anderson being hurt, would you estimate it was before you yourself went into the cab body and took up the

operation that Anderson had been doing before he got hurt?

THE WITNESS: About thirty, forty minutes.

THE COURT: Thirty, forty minutes.

THE WITNESS: Yes, sir.

THE COURT: Thank you. Will you please tell us what you found when you came into the cab, the cab body. When you entered it on that occasion, not on some other occasion, what did you find? What was going on there?

THE WITNESS: Nothing.

THE COURT: Well, by "nothing" you mean what?

THE WITNESS: In other words, all work was at a standstill.

THE COURT: Yes, sir. Was the machinery in the cab body at a standstill?

THE WITNESS: Yes, sir.

THE COURT: Complete standstill?

THE WITNESS: Yes, sir.

THE COURT: Very well. Now, you may go forward and demonstrate to the jury what you did when you entered the cab on that occasion.

MR. DAMMAR: Your Honor, may I object to this demonstration, because I don't think a proper foundation has been layed, I don't think it has been shown the conditions that existed at the time of the accident were

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the same as when the Captain took over and started to operate --

THE COURT: The Court gives you an opportunity on the voir dire if you wish to examine the Captain on that issue.

MR. DANAHAR: All right.

THE COURT: Come back, Captain. I am sorry, that is the way it has to be done. If he wants to do this he has a perfect right to do it and I can't deny him the right.

VOIR DIRE EXAMINATION

BY MR. DANAHAR:

Q Captain, when this accident happened you were in your office; is that right?

A Yes, sir.

Q How long had you been in your office before the accident?

MR. COHEN: Objection, that has --

THE COURT: Sustained. I don't think that makes any difference at all. Next question.

Q When was the last time you were out on deck and saw what was going on in connection with this procedure before this accident?

A When I gave the order to do it I went up to my office. That's where I stayed and was working on reports.

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THE COURT: That is what he testified before.

Q So you didn't see what was going on out on deck at the time this accident happened; isn't that so?

A No, sir.

MR. COHEN: Your Honor, this is not voir dire.

THE COURT: Hold it. He answered "No." Objection overruled, Mr. Cohen. The answer was "No." Next question.

Q You don't know what the conditions were out on deck or in the cab when this accident happened, do you?

A No, sir.

Q You don't know to what extent the wire on the tugger winch had been wound around the drum at the time of the accident, do you?

A No, sir.

Q How many turns of wire were there on the drum when you took over after the accident?

A I wouldn't know.

Q You don't know whether there were more or less than when this accident happened, do you?

MR. COHEN: He said he doesn't know, if your Honor please.

A No, sir.

THE COURT: He said he doesn't know.

Q Do you know what the lighting conditions were in

that cab at the time the accident happened? Answer yes or no, please.

A Yes.

Q You weren't there, were you?

A No.

Q Well then --

THE COURT: All right, the jury heard it. Next question.

Q You don't know whether the lighting conditions were the same at the time of the accident as when you went in there after the accident, do you?

A No.

MR. COHEN: If your Honor please, I must object. All I have asked the Captain to do was to show us how he stood when he operated the tugger winch afterward. This kind of interrogation is not a proper voir dire.

THE COURT: Yes, it is a proper interrogation. He has a right to show that when the Captain went in there, that the cab body where the Captain placed himself and the machinery and the lighting and everything else, what it was at that time, to show that it may have been different, there may have been different changes. The light may have been brighter, it may not have been on at all. All these things are for the jury to understand, because you are endeavoring

to get the witness to say, I am sure we have anticipated it, that he was able to operate this thing himself.

Well, we have got to find out whether or not the situation was identical to the situation that existed at the time Anderson got hurt.

The objection is overruled. Go ahead.

Q Did you observe the tugger wire itself before you started to operate the tugger wire? That is, did you observe its position?

A I knew that the wire was straight on the drum.

THE COURT: Did you observe its condition?

THE WITNESS: Yes.

THE COURT: The answer is yes.

Q Was it tight?

A Yes.

Q Did it extend across from the tugger winch over to --

A Yes.

Q [continuing] where the closing wire drum was?

A Yes.

Q And was it very tight?

A Yes.

Q It had a heavy strain on it at that point?

A Yes.

Q Did it run through a fairlead?

A Yes.

MR. DANAHAR: I have no further questions, your Honor, and I still press my objection.

THE COURT: The objection is overruled. Now, you can go down, Captain, and demonstrate what you did when you entered the cab on that particular occasion. Now let's not have any interruptions until the Captain has completed his demonstration.

Go ahead, Captain.

MR. DANAHAR: Your Honor, are you restricting me from making any objections? Is that what you mean?

THE COURT: I did not say that, and you know that. If there is a basis for your interrupting, you go ahead and interrupt. That is your right. That is what you are here for.

DIRECT EXAMINATION [CONTINUED]

BY MR. COHEN:

Q Captain, would you show us where you stood to operate the tugger winch after the accident.

A I stood on the starboard side of the wire, had my hand over here on the lever [indicating].

THE COURT: I am sorry, I can hear you perfectly, but I just want to share every word of it with the jury.

camds 421 De Graff - direct

You will just have to somehow make it possible for the jury to hear what he is saying.

MR. COHEN: May I state for the record, he indicated with his right hand on the control lever; is that right, Captain?

THE WITNESS: I stood on the right-hand side of the line with my right hand on the lever.

THE COURT: I wonder whether the ladies and gentlemen of the jury would oblige us only for the sake of saving time and not going through an awful long winded approach to this problem, would you rise, please, and just take a temporary position right opposite the witness so that you can see his face and see his demonstration and hear what he has to say. I would be much obliged.

Q In operating the tugger winch after the accident what hand did you use to operate the control handle?

A Right hand.

Q And on what side of the tugger winch cable was your body placed?

A On the right side of the wire.

MR. COHEN: That is all I wanted with this demonstration, your Honor.

THE COURT: Is that all?

MR. COHEN: That is all.

THE COURT: Are you through with that demonstration?

MR. COHEN: Yes, sir.

THE COURT: Thank you, ladies and gentlemen. Come back, Captain, please.

Q Now, Captain, on occasions other than the one we have spoken about have you operated tugger winches such as the one we are talking about?

A Yes, sir.

Q And on the basis of your experience doing that where should be operator position himself with regard to the handle and the wire? Do you have an opinion?

A He should stand on the --

MR. DANAHAR: Objection, your Honor.

THE COURT: On what basis?

MR. DANAHAR: There again, your Honor, there is no foundation layed for that question.

THE COURT: The years of experience of this man has to be weighed by the jury. But he has a perfect right to be asked that question as to how you operate a tugger winch of this nature and where you stand as you operate it.

MR. DANAHAR: It would depend upon the situation of the winch and everything else. There are a lot of variables.

THE COURT: That is up to you on cross-examination.

camds 423 De Graff - direct

Try to point out any differences. I will take the general answer. The objection is overruled.

A When you are operating a winch you always stand on the side where the lever is, the side of the wire that the lever is on.

THE COURT: Next question.

Q Captain, in your opinion is it good, safe practice to operate a tugger winch cable -- I am sorry -- to operate a tugger winch in a position whereby your body is over the running winch cable?

A No, sir.

Q And will you tell us why that is not a safe way to operate a tugger winch?

A Well, number one, you are over-balanced.

THE COURT: A little louder, Captain.

A Number one, you are over-balanced, and if you were to happen to lose your balance you would fall right into the wire.

Q That was number one. Are there any more reasons why that is not safe?

A Well, that's the main one.

THE COURT: All right. Next question.

Q Are there any other subsidiary reasons?

MR. DANAHAR: Objection, your Honor.

THE COURT: Objection sustained. Next question.

Q Captain, in the operation of a tugger winch, if from time to time the cable should not be spooling off reasonably evenly, how would the operator handle such a situation?

A Stop it. Reverse it. Then stop it and straighten your wire, then go ahead again.

Q Is it good, safe practice for a man operating a winch to touch the --

THE COURT: A winch. Please stick to the kind of winch. There have been hundreds of winches of different types, and you keep on talking about "winch." Why can't you stick to the winch involved in this case.

Q Is it good safe practice in your opinion, Captain, for a man operating a tugger winch to touch the moving wire going onto the winch with his hands?

A No, sir.

THE COURT: Anything else, Mr. Cohen?

MR. COHEN: I am just checking my notes, your Honor.

THE COURT: Good.

Q After the accident to Mr. Anderson when you went into the cab and operated the winch yourself, how long did it take, if you remember, for that operation to finish?

MR. DAMAHAR: Objection, your Honor.

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THE COURT: Objection sustained.

Q While you were in the cab after the accident operating the tugger winch were you alone in the cab?

A Yes, sir.

MR. COHEN: Thank you. Nothing further, your Honor.

THE COURT: All right. Cross-examination.

CROSS-EXAMINATION

BY MR. DANAHAR:

Q Capt. De Graff, you said it's not good, safe practice to touch a moving wire; is that right?

A That's right.

Q Is that because sometimes there are fishhooks in moving wires and you can get your hand either cut by the fishhook or if you had a glove on the fishhook could catch the glove and pull your hand into the wire?

A That's a reason, yes.

Q Are there times particularly in the beginning of this type of operation where the tugger wire is slack before you actually start to pull up the closing wire and where it's slack in the cab there, are there times when you have to guide it around the tugger winch drum until you get a certain amount of tension on the wire?

A No. That wire will lead by itself. That's why you have a fairlead.

Q But assuming that you have slack wire on the deck in front of the tugger which and you start up the tugger winch drum, isn't it necessary at times that some method be used to guide the wire around the drum until you get tension on the drum for the first few turns, I mean?

A You wind it on the drum and then you stop it, you straighten the wire, then you go ahead some more.

Q No, what I mean is when you first start winding it on the drum the first few turns that you take, doesn't it occur sometimes that unless you guide that wire in some way it will not go on evenly? Doesn't that happen sometimes? That's all I am asking.

A You start it, pull a couple of turns and stop it, straighten it by hand, and then you go ahead some more.

THE COURT: So there are occasions when it doesn't start and wind around evenly; isn't that so?

THE WITNESS: That's right, yes, sir.

THE COURT: That is the reason you have to stop.

THE WITNESS: That's right.

THE COURT: All right.

Q As a matter of fact, Captain, you have seen crew members on this very dredge, haven't you, operating this tugger winch, and you have seen them tapping that tugger winch wire to guide it onto the winch, haven't you?

A Yes.

MR. DANAHAR: No further questions.

MR. COHEN: May I ask where you have --

THE COURT: Oh, every time there is something, there has got to be an end.

MR. COHEN: I just wanted to ask a follow-up.

THE COURT: All right. Go ahead.

REDIRECT EXAMINATION

BY MR. COHEN:

Q When you have seen them doing that have you cautioned them?

A Yes, sir.

MR. DANAHAR: Objection, your Honor.

THE COURT: He has answered, yes sir.

MR. DANAHAR: I move to strike the answer.

THE COURT: Anything further?

MR. COHEN: No, sir.

THE COURT: Anything further, Mr. Danahar?

MR. DANAHAR: No, sir.

THE COURT: All right. That is it, Capt. De Graff.

[Witness excused]

THE COURT: Now, gentlemen, as I understand it we have come to the point where we can say to the jury, so they can make their own plans accordingly, that the only

testimony remaining on both sides of the case is the calling of the doctors, one doctor to be called by the plaintiff, and one doctor of medicine to be called by the defendant.

Am I right?

MR. DANAHAR: May we approach the bench, your Honor?

THE COURT: Come on up.

[At the side bar]

MR. DANAHAR: It's absolutely true, your Honor, that I agreed that as far as my direct case was concerned I have no more witnesses or anything, and I didn't expect to produce any more, but I might have some rebuttal in view of what has developed here today. I really don't know at this point. I might have to put something on to rebut some of the testimony given by the -- by Wheeler and by Capt. De Graff. That's the only thing I have in mind. I have a few things --

THE COURT: If you rebut I'm going to give him his opportunity to rebut.

MR. DANAHAR: I sincerely say that I will try my best not to, you know, bring in any witnesses.

THE COURT: You have not made up your mind, in other words, you don't know.

MR. DANAHAR: That's right. I really don't.

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THE COURT: Well, we will see what you have to --

MR. DANAHAR: And I will try my best to avoid doing it. In any event, very short I'm sure.

THE COURT: I know, it isn't a matter of shortness, it's a matter of what the quality is. And you would have to notify Mr. Cohen well in advance, and if he wants to go into rebuttal to respond to yours, I am going to give him that full opportunity.

MR. COHEN: Because I put my case in out of turn. It was the understanding, I thought we had, that we just had medical proof on Tuesday.

THE COURT: That is right. But at any rate, if there is some good and sufficient reason that he can give, he can't think of it now, to warrant going into this further, we will take it up at that time.

MR. COHEN: I will give him my home telephone number so he can reach me over the weekend.

THE COURT: Will you do that? Fine.

MR. DANAHAR: I assure your Honor that I will try my best to avoid it.

THE COURT: All right.

[In open court]

THE COURT: These are very affable, pleasant attorneys. They speak to each other with loving care and

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deep concern, but neither gives an inch, and that is the way it should be. All of which means that there may be, there may be an occasion to offer some proof which will be very limited, however, if I am assured in time, over and above the testimony of the doctors.

Well, what does that mean to you? It means that when the testimony is finished the attorneys will sum up to the jury, and then the Judge is compelled by law to charge the jury. We are not meeting tomorrow for reasons already established between counsel and the Court, and it was indicated to you that you would go over until next Tuesday after the close of today's testimony. It is now a quarter of 6:00, you have been very patient. I must say to you that we are going to complete our part of it on Tuesday. In other words, the balance of the proof, the summation of the case by the lawyers and the charge by the Court. Then the jury takes the case and enters upon its deliberations.

So that you may very well find, I don't know if it will be necessary, but who can tell, you may very well find that you may not be able to come to a decision within a matter of comparatively short time after you get the case. You may want more time in which event you have got to plan on being sent to dinner by the Judge, and also taken home

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in proper fashion if you find it necessary to continue with your deliberations in the evening.

So I want you to be prepared that this may mean that you are going to be tied up with this case not only during the day, but possibly a part of the evening on Tuesday.

We have been saying that to you on and off now and you have been spared, but Tuesday certainly looks like the day when we are winding this up and giving you the time that you should have to deliberate upon this without being pressured and not to interrupt your deliberations.

We don't look forward to spending evenings either, but that is our job, to stay with you while you do your job, and we have done it all our professional lives. So I want you to know what you are in for so that you can make your plans at home. All right?

We are going over then until Tuesday at 9:30 in the morning promptly. I can't direct this, but I wish and hope you have a very pleasant weekend and an enjoyable holiday on Monday. I hope you will get a chance to get out and get some fresh air and sunshine, and whatever we are in for together, because you have a very heavy schedule ahead of you on Tuesday. I can't tell you what a relief it is to a Judge and to counsel when a jury who are the judges of the facts listen with the care, the attention

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and the deep concern that you have reflected.

I would be false if I said it is unusual. I find that American citizens even in this day where everybody says no one gives a hoot, I find over and over again that when American citizens are called upon to perform an act of citizenship of high order, and there isn't anything greater in time of peace such as there is sitting as a juror, I find they come through. I find they are devoted and they are dedicated and they are deeply wrapped up with what is going on.

So we thank you for the peace that that brings to us, and we look forward to the pleasure of seeing you here all in good health and ready to carry on next Tuesday morning at 9:30.

Good night, ladies and gentlemen, good night counsel, and the suggestion I made to the ladies and gentlemen of the jury I hope you will apply to yourselves.

MR. COHEN: Thank you, your Honor.

MR. DANAHAR: Thank you, your Honor.

[Time noted: 5:50 p.m.]

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Michael T. Anderson

-vs- 71 Civ. 2910

Great Lakes Dredge & Dock Co.

New York, New York
February 19, 1974--9:30 a.m.

[In open court - jury present]

THE COURT: Good morning, ladies and gentlemen of the jury. Thank you very much for being on time. It is consistent with the attitude that you have adopted since you were sworn, and we appreciate it very much.

Call your witness to the stand, counsel.

MR. DANAHAR: I call Dr. Mauer.

I R V I N G M A U E R, called as a witness by the plaintiff, being first duly sworn, testified as follows:

MR. DANAHAR: If your Honor please, at this time I offer in evidence the medical record from French and Polyclinic Hospital in connection with this matter.

THE COURT: Mr. Cohen, is there any objection?

MR. COHEN: No objection, sir.

THE COURT: Received. Mark it in evidence, Mr. Clerk.

xx [Plaintiff's Exhibit 5 received in Evidence]

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MR. DANAHAR: May the exhibit be deemed as including the X-rays, your Honor?

THE COURT: Of course.

MR. DANAHAR: If your Honor please, I now offer in evidence the records from Doctor's Hospital in Staten Island, including the X-rays.

THE COURT: Mr. Cohen, is there any objection?

MR. COHEN: No, sir.

THE COURT: Received. Mark the report as one exhibit and mark the X-rays as A of that exhibit, Mr. Clerk, if you don't mind.

xx [Report marked Plaintiff's Exhibit 6 in Evidence; X-rays marked Plaintiff's Exhibit 5-A received in Evidence]

MR. DANAHAR: Your Honor, there are X-rays from Polyclinic which I suggest be marked Exhibit 5-A.

THE COURT: Don't worry about it. If you say anything the Congress is liable to pass a resolution abolishing the Clerk's job, and I need him. He is doing all right. Don't worry about it.

Next? What else do you have?

MR. DANAHAR: Your Honor, may I suggest, just how are we going to --

THE COURT: Please, sir, just go right ahead. We will take care of it.

MR. DANAHAR: Sorry. Now I offer in evidence the medical records from the Staten Island Hospital.

THE COURT: All right. Is there any objection, Mr. Cohen?

MR. COHEN: No, sir.

THE COURT: Is it just the report from the Staten Island Hospital?

MR. DANAHAR: It's a report, yes, your Honor. There are no X-rays.

THE COURT: Very well. Mark that report. How are you marking it, Mr. Clerk?

THE CLERK: Plaintiff's Exhibit No.7, your Honor.

xx [Plaintiff's Exhibit 7 received in Evidence]

MR. DANAHAR: I now offer in evidence the medical records from the United States Public Health Service Hospital in Staten Island consisting of four folders.

THE COURT: Mr. Cohen?

MR. COHEN: No objection, sir.

THE COURT: Received. The four folders become Plaintiff's Exhibit 8 in evidence.

xx [Plaintiff's Exhibit 8 received in Evidence]

THE COURT: Mr. Danahar, in order to put your mind at ease, every time you refer to the reports just say to the doctor, I show you report from hospital such and such,

an X-ray from hospital such and such.

MR. DANAHAR: All right, your Honor.

THE COURT: That would be double assurance that we know what you are talking about, and the record will be clear.

MR. DANAHAR: Yes, sir.

If your Honor please, I offer in evidence medical report of duty status slip received by Mr. Anderson the last time he visited the United States Public Health Service Hospital on January 30, 1974.

MR. COHEN: May I see that, please?

THE COURT: Of course. I thought you had, Mr.Cohen.

MR. COHEN: I would object to this unless the doctor is here, your Honor. I would object to this, if your Honor please.

THE COURT: The objection will have to be sustained unless the person is here who made the entry. You should have taken it up with counsel. I would take that up with you later if you want to, counsel, but right now Mr. Cohen objects. I have to sustain the objection.

MR. DANAHAR: Your Honor, may I just take a moment to prove the authenticity of that record by --

THE COURT: Why didn't you take it up with Mr.Cohen during all this period, Mr. Danahar?

MR. DANAHAR: Well, I didn't feel there would be any objection to it, your Honor.

THE COURT: All right.

MR. DANAHAR: All I would like to do is put Mr. Anderson on the stand just for a minute or two and he can tell exactly the circumstances under which he got that report.

THE COURT: When you say "that report" you mean the one that you last offered?

MR. DANAHAR: Yes, sir.

THE COURT: And it was issued to him by the Staten Island Public Health Service?

MR. DANAHAR: Yes, sir. And by the doctor who signed that report.

THE COURT: All right.

Mr. Cohen, will you reexamine it in the light of that and see what you think? I don't want you to give up anything that you think you ought to stand by, but it looks on its face that there might be something to it. I am not suggesting that there is.

MR. COHEN: May I be heard, your Honor?

THE COURT: Surely.

MR. COHEN: It seems to be signed by somebody whose signature cannot be made out, but it is a signature either

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of a medical officer or a medical record librarian. It is a slip of paper, it doesn't appear to be part of the hospital record per se which has been offered in evidence and to which I had no objection. It states certain opinions and conclusions which I can't agree go in this way.

THE COURT: All right. The objection will have to be sustained at this time.

Will you mark that for identification, please, Mr. Clerk.

xx [Plaintiff's Exhibit 9 marked for Identification]

THE COURT: Do you need that for Dr. Mauer?

MR. DANAHAR: I believe I do, yes, your Honor.

THE COURT: Well then, I will have to call him off and you will have to put your man on. I don't know whether that will help any because the fact that he got it does not necessarily mean that the opinion can go in.

MR. DANAHAR: Well, all I am trying to prove is the authenticity of this document, your Honor, and if it's an authentic document then I believe it should be admitted.

THE COURT: I won't prevent you from doing anything that you feel you have to.

Will you step down, Doctor.

[Witness temporarily excused]

MR. DANAHAR: Mr. Anderson, would you take the

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stand, please.

THE COURT: You are sure you need that for Dr. Mauer, do you? Because I am not going to keep the doctor here after everybody came here purposely at 9:30 and you are going to spend time on that. You can put that in later. Do you need that exhibit again marked for identification for Dr. Mauer's testimony? You ought to know whether you do or not.

MR. DANAHAR: I believe I do, your Honor. And this will only take a minute or two, I am sure.

THE COURT: It will not necessarily go in, you understand.

MR. DANAHAR: I understand, your Honor.

M I C H A E L T. A N D E R S O N, called as a witness in his own behalf, having previously been sworn, testified further as follows:

DIRECT EXAMINATION CONTINUED

BY MR. DANAHAR:

Q Mr. Anderson, I show you Plaintiff's Exhibit 9 marked for Identification and I ask you what that is [handing]?

MR. COHEN: Objection, if your Honor please. It is immaterial.

THE COURT: The objection is overruled. Did you

get that statement? Not what that is, did you get that piece of paper, Exhibit 9 marked for identification?

THE WITNESS: Yes, your Honor.

THE COURT: When did you get it?

THE WITNESS: June 30th.

MR. DANAHAR: January.

THE COURT: Where did you get it? Make up your mind. Now, where was it?

THE WITNESS: I got it at the Marine Hospital, your Honor.

THE COURT: Who handed it to you?

THE WITNESS: Dr. Miceli.

THE COURT: That is all you know about it; he gave you that piece of paper?

THE WITNESS: Yes, sir. He signed it right in front of me and gave it to me.

THE COURT: And that was last January? Last month?

THE WITNESS: Last month, yes, your Honor.

THE COURT: All right. And you are positive of that?

THE WITNESS: Yes, sir.

THE COURT: All right. Mr. Cohen, do you want to ask any questions?

MR. COHEN: No, sir.

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THE COURT: All right, step down.

MR. DANAHAR: Was the information that is recorded on that document recorded by Dr. Miceli?

MR. COHEN: Objection, your Honor.

THE COURT: Sustained. Good Lord, he can't tell what Dr. Miceli did with it.

MR. DANAHAR: Well, is the writing that is on that document, was that writing made in your presence by Dr.Miceli?

THE COURT: That is a different proposition.

MR. DANAHAR: Yes, sir.

THE WITNESS: Yes. He filled this out right in front of me.

THE COURT: He did?

THE WITNESS: Yes, sir.

THE COURT: All right. Let me see it.

All right.

MR. DANAHAR: That's all, your Honor.

THE COURT: And you saw him write what is hand-written on Exhibit No.9 marked for identification; is that what you are saying?

THE WITNESS: Yes, your Honor.

THE COURT: And you looked while he was writing it? Did you look at him while he was writing?

THE WITNESS: Yes.

THE COURT: Did you see him write it?

THE WITNESS: Yes, your Honor.

THE COURT: You are positive of it?

THE WITNESS: Yes, your Honor.

THE COURT: And that is your sworn testimony?

THE WITNESS: Yes, your Honor.

THE COURT: All right. I want you to be sure you understand what you are saying.

All right, do you want to cross-examine him at all, Mr. Cohen? He says he saw that writing.

MR. COHEN: I have no cross-examination, your Honor.

THE COURT: All right. Step down.

[Witness excused]

MR. DANAHAR: I offer it in evidence.

MR. COHEN: I press my objection, you Honor. The mere fact that he was given a piece of paper written out and signed by Dr. Miceli does not make that paper admissible.

THE COURT: Decision reserved. Next.

MR. DANAHAR: Just for the record I am offering Plaintiff's Exhibit 9 marked for Identification in evidence.

THE COURT: Yes, sir. That has already been noted.

All right, Dr. Mauer, you may resume the stand.

As a matter of fact, counsel, if Dr. Mauer is the doctor who handled the plaintiff's case he certainly is

in a position to express whatever there might have been expressed by other doctors with regard to this claimed condition. So I don't see that if you need any particular paper; he is not dependent upon that paper. He has his own view with regard to that. Isn't that really so?

MR. DANAHAR: Yes, he does have his own view, your Honor.

THE COURT: All right. Go ahead. Let's go.

I R V I N G M A U E R, called as a witness by the plaintiff, having previously been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DANAHAR:

Q Dr. Mauer, are you a physician duly licensed to practice in the State of New York?

A I am.

Q How many years have you been licensed?

A About twenty-four.

Q In connection with your practice of medicine do you have a specialty?

A Orthopedic surgery.

Q What does that specialty embrace?

A Orthopedic surgery is that branch of surgery that deals with infections of the bones and joints, and moving

parts of the skeleton, the nerves and muscles that have to do with the moving parts of the skeleton.

Q Doctor, will you tell us what medical training you had?

A I graduated from Long Island College of Medicine in 1949. I had an internship residency in surgery, and then in orthopedic surgery. I completed my residency in 1955. I then became certified by the American Board of Orthopedic Surgeons and became a Fellow of the American College of Surgeons, and the American Academy of Orthopedic Surgeons.

From 1955 until 1958 I was in charge of the facilities of the Public Health Service in Staten Island as chief of orthopedic surgery.

I have been in private practice of orthopedic surgery since 1958 in New York City.

I have been on the teaching staff of the New York Medical College. I am now on the teaching staff of the Albert Einstein Medical College and the Mt. Sinai Medical College.

I am a consultant to the Police Department of the City of New York in orthopedic surgery.

Q Doctor, did you have occasion to see and examine Michael Anderson, the plaintiff in this case?

A I did.

Q When was that that you saw him for the first time?

A On September 12, 19 -- September 4, 1973.

Q Did you have occasion to examine him again after that?

A Yes, I saw him again this morning briefly.

Q Did you examine him at that time?

A I did, sir.

Q Did you have occasion to examine any medical records in connection with this matter?

A Yes, sir.

Q What records were they?

A I looked at the records of the Staten Island Public Health Service Hospital and I reviewed the X-rays of his original admission at the Staten Island Hospital.

Q In connection with your practice, do you have occasion to view and interpret X-rays?

A I do.

MR. DANAHAR: Your Honor, may we have a shadow box?

THE COURT: Of course. Mr. Clerk, would you get a shadow box for counsel.

MR. DANAHAR: I can proceed in the meantime, your Honor.

THE COURT: Yes, will you please.

Q Doctor, I show you Plaintiff's Exhibit No.5-A -- if your Honor please, I notice that --

THE COURT: Just tell him what you are showing him. Don't worry about the number. What are you showing him?

MR. DANAHAR: But it's marked for identification.

THE COURT: From what hospital?

MR. DANAHAR: Doctor's Hospital.

THE COURT: That is in evidence, isn't it?

MR. DANAHAR: That's what I'm trying to bring to bring to your Honor's attention.

THE COURT: But it is in evidence.

MR. DANAHAR: It's marked for identification.

THE COURT: It is in evidence. Go on.

Q Now, Doctor, will you extract the X-rays from that hosptial and pick out those X-rays which in your opinion show the injuries sustained by Mr. Anderson in his accident of October 18, 1970 [handing].

A Well, I --

MR. DANAHAR: Now, your Honor, may I wait for the shadow box?

THE COURT: Do whatever you can. If you can't go on with something else you will just have to wait.

MR. DANAHAR: Yes, sir. I would prefer that we have a shadow box so that the jury can --

THE COURT: Sir, if you have something else to

ask him about you can go ahead with it and come back to what is needed.

Maybe this will help you, Doctor [handing].

THE WITNESS: Yes, sir. This is an X-ray taken on October 21st -- there probably is an X-ray a little sooner, but all of them look the same. This is an X-ray of Mr. Anderson's arm bone, the humerus which is the main arm bone, and this shows that the arm bone is broken right at this level [indicating].

MR. DANAHAR: If your Honor please, I am standing here and I cannot see the X-ray and I am wondering whether the jurors can. It's facing that way, your Honor.

THE COURT: All right. If you wish to wait, we will wait.

MR. DANAHAR: I would prefer it, if your Honor please.

THE COURT: Yes. Surely.

Q Doctor, will you tell us what kind of an examination you made of Mr. Anderson on the date that you examined him?

A I examined him, I did an orthopedic examination, and I checked the strength, range of motion and function of his left upper extremity.

THE COURT: How did you go about that, Doctor? Will you explain that to us?

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THE WITNESS: I also took a history. Yes. What I did is check the motion of the shoulder, the motion and strength and sensation of the shoulder, wrist, elbow and fingers, and recorded them.

Q What were your findings as a result of your examination?

A I found that he was a heavily muscled individual, there was clumsiness in unbuttoning the buttons and using the left hand with inability properly to abduct and extend the thumb. That means to bring the thumb up and around.

I found that there was a well healed scar on the inner side of the left upper arm extending for approximately six inches, and that there were four scars on the forearm, one approximately three inches on this side, on the radial aspect, another longitudinal, another one on the ulnar side about two and a half inches.

I found a transverse scar going this way [indicating], on this side, and an SH scar on the front of the wrist where tendons were reimplanted.

I will explain that. There was also a large healed abrasion, or scrape over the front portion of the elbow. I found thathe could extend, or straighten the wrist, but that resisted flexion of the wrist was extremely weak. That is, when he bent the wrist I could easily bring it up because

the muscles that bent the wrist were not present any more.

I found that the grip --

THE COURT: What do you mean, were not present any more?

THE WITNESS: In the course of his treatment, sir, what they did, because as a result of his broken arm he became paralyzed and lost the ability to raise the wrist, he had a wrist-drop. What they did surgically to him was to take half the muscles that bend the wrist down and brought them up so that he now had muscles that could bring the wrist up, but the bending muscles were deficient because they had bee borrowed, or transplanted to bring his wrist up.

THE COURT: All right. Now, that makes it clear. If you will only bear in mind that we are not in the medical profession and we must be taught these things in simple expressions so as to register with us. We would appreciate that, Doctor, as you go forward.

THE WITNESS: Yes, sir.

THE COURT: Don't be afraid or ashamed at reducing it for the Judge's benefit. I don't know about the jury, but just for me make it ABC. All right?

THE WITNESS: Yes, sir.

BY MR. DANAHAR:

Q Are you finished, Doctor?

A No. I found that the grip was good, but there were parasthias, or straining sensations, deficient sensations in nerve feeling in the entire left upper extremity.

I found that abduction, or bringing up of the thumb, this motion [indicating], the hitchhiking motion, is only fifty percent of normal when compared to the opposite right side.

When the patient was asked to extend both wrists I found that the right wrist extended to ninety, the left wrist extended to about sixty, and that the fourth and fifth fingers droop, that is, ninety degree and sixty degrees.

With the hands in supination, that is, this way [indicating], like a soupspoon, the patient could flex the right wrist to ninety degrees, in other words, he could bring it up to ninety degrees, the left wrist he could only bring up to neutral. And this flexion is carried out using the finger flexes..

In other words, there are muscles that go from -- every joint has several muscles that make it move. The muscles are pieces of meat to which strings, or tendons are attached, and these tendons then attach on the bone, like imagine a string with a guy wire, and that's what makes a joint move.

Now, in bending the wrist there are several groups of these guy wires, or tendons, that go across the wrist and

cause it to bend. There are the wrist bending muscles, that is muscles going from the elbow to the wrist itself, and there are also other muscles that go to bend the fingers which also pass to the wrist.

Now, he was bending his wrist downwards using the finger bending muscles because the wrist bending muscles had been borrowed to straighten the wrist.

THE COURT: Doctor, would you please illustrate with the left, because that is the injured one, is it not?

THE WITNESS: Yes, sir.

THE COURT: You keep on demonstrating with the right, and it's a little confusing. Would you be good enough to demonstrate with the left hand just what you found was the limit of his motion in that respect, even though it is somewhat repetitious.

THE WITNESS: Okay, sir. He could only bring the thumb up to fifty percent of normal, like that [indicating].

THE COURT: Thank you. That's right, make the comparison with the right hand.

THE WITNESS: When he was asked to extend both wrists, the right wrist extends to ninety and the left wrist extends to about --

THE COURT: Left wrist, now, use the left hand, will you?

THE WITNESS: Yes, sir. This is my left [indicating]. The right wrist goes up to ninety degrees, and the left goes up to sixty. With a droop of the fourth and fifth fingers.

With the hands in supination, that is this way [indicating], the patient could flex the right wrist to ninety degrees, the left wrist to neutral.

THE COURT: Very good. Next. That is clear.

THE WITNESS: And this is carried out using the finger flexes. What he could bring up he could bring it up only --

THE COURT: As you demonstrated.

THE WITNESS: No ulnar deviation could be carried out on the left side. He couldn't bring it over this way [indicating].

THE COURT: With the witness demonstrating the comparison between the right and the left-hand side. I want you to show that.

THE WITNESS: About three to five degrees of radial deviation could be carried out on the -- excuse me -- can be carried out on the left, about fifteen degrees can be carried out on the right.

The patient lacks about ten degrees of terminal pronation, that's this way [indicating]. Pronation is

this way [indicating], and supination on the left side when compared to the right.

May I have something, a pointer or something long? Or a ruler?

THE COURT: Yes.

THE WITNESS: This motion is pronation and supination [indicating]. I am showing it to you with my right side. And this was his normal pronation and supination.

You can see you can go all the way around. On his left side he lacked ten degrees, in other words, he didn't get all the way around this way or around this way [indicating].

Resisted pronation and supination are about seventy-five percent of normal on the left when compared to the right. In other words, when I took his left hand and I said, push against me, he had weakness on pronation and supination on the left side when compared to the right.

I took X-rays, and those showed that there was a healed break in the arm bone, and I found metal sutures or stitches at the end of the wrist where the tendons had been transplanted. I found that the transplanted tendons appeared to be functioning well.

BY MR. DANAHAR:

Q Now, Doctor, you have examined the records at the

Doctor's Hospital; is that correct?

A Yes, sir.

Q What diagnosis did they come to with respect to Mr. Anderson's injury?

A He had a broken arm, a broken humerus with paralysis of the nerve that supplies the muscles to extend the wrist and some of the fingers.

Q And when you refer to the humerus you are referring to the upper part of the arm?

A Yes, sir.

Q Doctor, would you take the shadow box --

THE COURT: Mr. Clerk, will you place it up to the witness's chair for the doctor?

Can the jury see the box all right? Good. Now, that is an X-ray for which --

THE WITNESS: This is an X-ray from the Doctor's Hospital in Staten Island, and this is dated 10/20/70, and it is an X-ray of his left arm, and it shows the arm bone. Here is the break in the arm bone with a splinter just about over here [indicating], and there is a spike, this splinter may represent a spike of bone on which apparently the nerve that goes to the arm was impaled.

Q Can you estimate the distance between the break, Doctor, approximately?

A It's about three-quarters of an inch.

THE COURT: Anything else with that X-ray, sir?

MR. DANAHAR: No, sir.

THE COURT: All right. Next question.

Q Are there any other X-rays that you would show to give --

THE COURT: Are there any other X-rays that you regard as edifying to this jury in order to illustrate the testimony you have already given? Where is that X-ray from?

THE WITNESS: This is another X-ray from Doctor's Hospital dated the 18th of December, 1970. This shows where he had had an operation to fix the fracture in which they put in a plate and screws to hold the fracture together.

This is a steel, or metal plate, either steel or some similar material that the body does not absorb and screws that screw the bone together, and you see six screws and the plate on the arm bone, and you see that the fracture line, this is December of 1970, the fracture is beginning to obliterate and there is a large amount of new bone covering up the callus.

The other X-rays in the groups show that the arm bone had healed with this plate in place.

THE COURT: Counsel is very anxious, Doctor, he wants to be sure he has covered the ground and you are the

one who knows what to put your fingers on. Are there any other X-rays that you examined in connection with this case that you think the jury's attention should be called to? We don't want something that is duplicitas, but we would like to have anything that adds information.

THE WITNESS: Yes, sir.

THE COURT: Very well. Won't you please proceed, because counsel will feel, and properly so, that he has not done his full duty unless he gets your --

THE WITNESS: Was your question have I examined in this group --

THE COURT: Any X-rays that are before us as exhibits. Regardless of the hospital.

THE WITNESS: Well, I have my own X-rays.

THE COURT: That you took?

THE WITNESS: Yes, sir.

THE COURT: Very well. Have they been offered in evidence?

MR. DANAHAR: No, they have not, your Honor.

THE COURT: All right. The doctor says he has his own X-rays.

MR. DANAHAR: I offer them in evidence, your Honor.

THE COURT: All right, sir. Now, Mr. Cohen, would you like to see them or examine them?

MR. COHEN: No, I have no objection, your Honor.

THE COURT: No objection. Doctor, how many X-rays are there that you took?

THE WITNESS: Four.

THE COURT: All right. Mr. Clerk, will you mark those please as one exhibit in evidence, and there being no objection,would that not be Exhibit No.10?

THE CLERK: Yes, your Honor.

THE COURT: Plaintiff's Exhibit No.10 in evidence.

xx [Plaintiff's Exhibit 10 received in Evidence]

THE COURT: Now, Doctor, you have Exhibit No.10 in evidence before you. Those are your X-rays, four in number. Are you going to show us those four?

THE WITNESS: No, sir.

THE COURT: Which ones are you going to show us?

THE WITNESS: I will show you two.

THE COURT: Two. Very well. Please explain them.

THE WITNESS: Here is an X-ray of his arm bone showing that the arm bone is completely healed. However, you see all this extra bone, spicules, or extra bone that has grown up as a result of removal of the plate.

The plate had been removed at an operation at the Marine Hospital in Staten Island during the time that these tendons were transferred, and as a result of the

fracture and removal of the plate we have all this extra bone that is now growing up around the fracture.

So it does show that the arm is healed, it's a tiny bit crooked, but it's perfectly okay functionally and it's a solid humerus except for the soft tissue.

Now, you can see even in the soft tissue shadows. I am showing right here where meat has grown around the bone, and what you see here is a muscle, right, this plane over here, this line that I am showing you is a line of scar tissue that is enveloping his entire upper arm and tying down the structures in the upper arm.

Q May I ask the date of that X-ray?

A This is an X-ray that I took when I examined him on September 4, 1973.

THE COURT: September 4th of last year?

THE WITNESS: Yes, sir.

Q Doctor, may I interrupt you and ask, what would be the effect of this scar tissue that is growing around the bone?

A Well, when the scar tissue grows around the bone it envelops the soft parts of the arm, and this enables somebody to work for a short period of time without too much difficulty, but it shortens his amount of time that he could work because after awhile the scar tissue just stops you

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from working and causes you to tire easily, and it causes weakness in the use of the arm.

Here is an X-ray which I took of his wrist. This just shows these little things that you see right here on the side which look like strings, or wires, really are strings and wires. These are the wires that were used to reattach the muscles that were taken, the bending muscles to reattach them to make them straightening out muscles.

Q Doctor, in your examination of the records in this case did you find out that sometime in August of 1972 Mr. Anderson fell and had a fracture of the radius of the left wrist?

A Yes.

Q Referring now to the exhibit that is in the box there is there anything shown in that X-ray which indicates that there was any residual from that facture of the left wrist in August 1973?

A No, sir.

Q Has that fracture completely healed as far as those X-rays show?

A Yes.

Q Doctor, an operation was performed at Doctor's Hospital, and at that time they inserted this plate that you have shown in the X-rays; is that correct?

A That's right.

Q And after the operation was completed in what condition was Mr.Anderson's arm left?

A He was left with a paralyzed arm, essentially. His wrist did not straighten out. He couldn't lift anything, and he had weakness of the wrist. That's after the operation was over, and after the healing was over and after the bone had healed, Mr. Anderson was left with a paralyzed wrist.

Q That is what you referred to as the wrist drop?

A Yes.

Q How long did that condition continue?

A It continued until his operation at the Public Health Service. Essentially he still has a paralyzed wrist. He just has a wrist that has been fixed up to appear functionally not paralyzed, but it's only a half useful wrist because what they have done is, imagine a car with eight cylinders, with four of them out, all they have done is taken two cylinders on either side to make the engine go. And this is more or less what they have done with his wrist. They have taken the muscles that bend the wrist and brought them round to be wrist extensors, but functionally his wrist is a useful wrist but anatomically he still has a paralyzed wrist.

Q Doctor, do you have an opinion with a reasonable

degree of medical certainty based upon your examination of Mr. Anderson, and based upon your review of the records, as to whether the injuries thatyou have described and the conditions that you have described with respect to Mr. Anderson's arm and wrist are causally related to an accident which he described to you on October 18, 1970?

A I do.

Q What is your opinion?

A They are.

Q In your opinion can anything be done to improve his condition?

A No.

Q Is this a permanent condition that he has?

A Yes.

Q Doctor, I ask you to assume that the duties of an operator on a dredge are to manipulate controls in connection with the crane that is on the dredge; sometimes as operator when he is not handling the controls of the crane it is his responsibility, or duty to lift heavy objects such as heavy wire cables; it is also his responsibility to tie up vessels using heavy lines and various other heavy objects he is required to handle.

Do you have an opinion with a reasonable degree of medical certainty whether Mr. Anderson in his present

condition -- and I am referring now to his arm -- could do that type of work?

MR. COHEN: If your Honor please, I object to questions relating to the job of an operator which was not Mr. Anderson's job at that time.

THE COURT: The objection is overruled. Have you an opinion, Doctor?

THE WITNESS: Yes, sir.

THE COURT: What is that opinion?

THE WITNESS: I feel he could not.

Q Now, assuming that a mate on a dredge, a steady mate on a dredge has to perform the same type of duties and work except that he does not operate the controls of the derrick on the dredge; do you have an opinion with a reasonable degree of medical certainty whether Mr. Anderson could perform the duties of a steady mate?

A I do.

Q What is your opinion?

A No. I do not think so.

Q Can you tell us why, Doctor? What is the basis for your opinion?

A He has to have a hand that is dependable, and that will not tire, and that will respond to commands of the brain constantly under heavy work. He is working that crane

as the operator, or doing the other things, even not working the crane, he is not able to lift heavy weights on a constant basis.

Q Doctor, I think you told us that you were chief of orthopedic surgery at the Marine Hospital in Staten Island?

A That's right.

Q And that is the same hospital where Mr. Anderson had his operation when they removed the plate from his arm and did this muscle work; is that correct?

A That's right.

Q Doctor, what is the common way of denoting that a patient from the Marine Hospital is not fit for duty? How do they usually enter that in the record?

A They write down "NFFD".

Q Which means, not fit for duty?

A That's correct.

Q What is a person is only fit for light duty, what would they --

A They would write "FFLD". Fit for light duty.

MR. DANAHAR: I have no further questions, your Honor.

THE COURT: Cross-examination, Mr. Cohen.

Mauer - cross

Q Dr. Mauer, where is your office located?

A In Forest Hills.

Q Do I understand that you first saw Mr. Anderson on September 4, 1973?

A That's right.

Q Had he been a patient of yours before that time?

A No.

Q Under what circumstances did he come to see you on September 4, 1973?

A Mr. Danaher asked me to examine him.

Q Had you known Mr. Danahar from before?

A I had been acquainted with him from before, yes.

Q Did you issue a report of your examination in this case?

A I did.

Q To whom did you send your report?

A I sent it to Mr. Corcoran.

Q Is that the attorney with whom Mr. Danahar is associated?

A Yes, sir.

Q Where are they located, please?

A In Kew Gardens.

Q Had you known Mr. Corcoran before?

A No, sir.

Q Had Mr. Danahar been a patient of yours before?

A No, sir.

Q Well, under what circumstances had you known Mr. Danahar before?

A I believe that he was in your position on one occasion before.

Q Had he sent other people to you for examination?

A No, sir.

Q Now, when Mr. Danahar sent Mr. Anderson to see you on September 4, 1973, was that so that you could treat Mr. Anderson, or just so that you could examine him and come to court to testify?

A The latter.

Q By "The latter" you mean to examine him and then come to court to testify; is that correct?

A That's right.

Q Mr. Anderson is a right-handed gentleman; is that correct?

A That's right.

Q Now, Mr. Danahar asked you some question about a fracture of the radius bone of the wrist in August of 1972; do you recall that?

A That's right.

Q Do you recall you indicated there was a fracture of the navicular bone of the wrist at that time? Is that correct?

A That's right.

Q Now, the navicular bone is a bone in the wrist that is different than the radius bone; isn't it?

A That's right.

Q They are two separate bones?

A That's right.

Q How many bones in the wrist did he fracture in the accident in August of 1972?

A From a review of the records of the Public Health Service Hospital this morning he did only break the radius, and this history that was given to me of the navicular was in error.

Q When you put in your report that he suffered a fracture of the left navicular bone wasn't that based on your review of the records?

A No, sir. It was based on oral -- what was told to me. I don't believe that there were records.

Q Who told it to you?

A Either Mr. Anderson or Mr. Danahar.

Q In other words, this entire history of what had

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happened that is contained in the first five paragraphs of your report, that is based on what either Mr. Anderson or Mr. Danahar told you?

A I believe. I don't know what records I did see at that time.

Q Did you keep a note as to whether all the hospital records that you see before you today were shown to you at that time?

A No, I don't.

Q Do you know without any note whether or not you saw all the records?

A No.

Q So you arrived at your opinions and conclusions without seeing the hospital records; is that correct?

MR. DANAHAR: Objection, your Honor.

THE COURT: Objection overruled.

A Yes.

THE COURT: Next question.

Q What you have been testifying to, Doctor, are your opinions regarding various questions that were put to you by Mr. Danahar; is that correct?

A Well, I have been explaining the hospital records.

Q Yes.

A And I have only testified as to my opinion where

I have been asked what my opinion was. Other times I have been testifying to what the facts were.

Q Right. And on those questions calling for your opinion you gave us your opinion based upon your examination of Mr. Anderson; is that correct?

A Based upon my examination and my experience, yes, sir.

THE COURT: And also your examination of the hospital records. Or am I mistaken?

THE WITNESS: No, sir.

THE COURT: Didn't you study them?

THE WITNESS: I saw them, yes, sir, but my opinion of his duty status and what he could do has nothing to do with the hospital records. The hospital records tell me what was done, and I knew what was done from examining him so I didn't need the hospital records for that. I only needed the hospital records to tell me which bone had been broken in the wrist, and that actually made no difference in my opinion one way or the other.

THE COURT: Then the fact remains that you did look at the hospital records which any doctor would when he gets a matter referred to him, that there has been medical attention given to that person before. You do look at it, don't you?

THE WITNESS: Yes, sir.

THE COURT: Yes. That is all he asked you. You did examine them.

All right.

Q Perhaps I misunderstood you, Doctor. I want to be fair. Didn't you testify that when you first examined Mr. Anderson on September 4, 1973 you did not look at the hospital records?

MR. DANAHAR: I object to that, your Honor.

THE COURT: Yes, I will let the doctor answer it to clear it up. Is that what you so testified?

THE WITNESS: I testified that when I saw him in September of 1973 I don't recall whether I had seen the hospital records.

THE COURT: That's right.

Q Other doctors are entitled to have differences of opinion with you, are they not?

A Yes.

MR. COHEN: I have no further questions.

THE COURT: Is there anything further, Mr. Danahar?

MR. DANAHAR: No, your Honor.

THE COURT: Doctor, you are excused.

Is there another doctor in the courtroom? We said we would oblige every medical man.

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MR. COHEN: Yes, I have Dr. Lodico, your Honor.

THE COURT: Have you any objection if the other doctor is called, Mr. Danahar?

MR. DANAHAR: No, your Honor.

MR.COHEN: May I have a few minutes with Dr. Lodico first, your Honor?

THE COURT: Yes.

MR. COHEN: May I ask Mr. Danahar if he is going to rest his case?

THE COURT: All right. You can do that in the absence of the jury. Is there something you want to say, Mr. Danahar?

MR. DANAHAR: Yes, your Honor, but I think it should be said in the absence of the jury.

THE COURT: All right. I am going to excuse the jury.

Ladies and gentlemen, please all rise. We will excuse you just for a few minutes, I hope.

[Jury leaves the courtroom]

THE COURT: Mr. Danahar, what do you want to say?

MR. DANAHAR: If your Honor please, if you recall last week Mr. Cohen asked your Honor if he could have an up-to-date physical examination of the plaintiff.

THE COURT: That's right.

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MR. DANAHAR: I was inclined to object to that at this stage of the proceedings, but your Honor convinced me that perhaps he should have an up-to-date physical.

THE COURT: That was at the beginning of the trial, as I remember.

MR. DANAHAR: That's right.

THE COURT: Where we had an off the record discussion. And you consented to it.

MR. DANAHAR: I consented to it. And I think, your Honor, I also asked at that time, and I think your Honor indicated that when the examination was held I should receive a copy of the doctor's report. And as your Honor knows the Federal Rules provide that any doctor's report should not only include his findings, diagnosis, but also whatever conclusions he came to.

On Thursday night of this past week when we adjourned, we adjourned to Dr. Lodico's office, who is the doctor that the defendant now plans to call. I was present at that time. A history was taken from Mr. Anderson. Mr. Cohen was also present.

Dr. Lodico made notes of what the history was. He examined Mr. Anderson, and he did this on legal cap paper in his own handwriting, and the reason I was given for this was that, something to do with the dictating machine, he

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couldn't have it typed up, or something like that.

THE COURT: May I interrupt you? Do I understand that the legal cap notes were given to you, is that it?

MR. DANAHAR: I am going to tell you about that, your Honor.

THE COURT: I'm sorry.

MR. DANAHAR: After the examination was over Mr. Cohen remained with Dr. Lodico, I would estimate about twenty minutes, I assume talking to him, and I assume talking to him about this examination.

Thereafter I asked Mr. Cohen for a copy of the doctor's report, and he said, well, you can pick it up tomorrow at my office if you send a messenger.

I sent a messenger, and what the messenger picked up was Dr. Lodico's notes that he had made during the course of the examination, and it also includes his findings.

May I have those notes marked for identification, your Honor?

THE COURT: Surely.

xx [Plaintiff's Exhibit No.11 marked for Identification]

MR. DANAHAR: I called to Mr. Cohen's attention after I received --

THE COURT: Plaintiff's Exhibit No.11 now marked for identification?

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MR. DANAHAR: [continuing] Plaintiff's Exhibit No.1 marked for Identification, that these are just the notes that Dr. Lodico made at the examination, and while they do contain his findings there is absolutely nothing in there as to his conclusions in this case.

I asked Mr. Cohen, do you have a report from him in which he has expressed his conclusion about this matter.

THE COURT: When did you ask that of Mr. Cohen?

MR. DANAHAR: I asked that of him yesterday. I called him on the telephone and asked him of that. I am not sure, but I even think I asked him Thursday night whether he had gotten any opinion from Dr. Lodico, and I got no reasonable response. And up to this very moment I do not know what Dr. Lodico's conclusions are as result of his examination of my client last Thursday, and I think under the Rules I am entitled to those conclusions, and in view of the fact that I have not been furnished with them I object to any testimony from Dr. Lodico in this case.

THE COURT: All right. What do you say, Mr. Cohen?

MR. COHEN: May I say several things, your Honor? Firstly, Dr. Mauer gave a lot of testimony which is not contained verbatim in his report. He talked about subjects which are not gone into in his report. And, as your Honor knows from sitting on many of these cases, that the

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physician's report does not contain everything that he is asked about and testifies to from the stand.

Now, with respect to what occurred at Dr. Lodico's office this past Thursday, we left court, if your Honor will recall, slightly after 6:00 o'clock and we went immediately to Dr. Lodico's office so that he could have an examination of Mr. Anderson.

Dr. Lodico was there waiting for us. I might add his wife was also there waiting for him. We spent several hours at Dr. Lodico's office, because he spent several hours for an examination of Mr.Anderson.

During the course of the examination I think I gave him legal cap paper, if that is of any significance, to make his notes on. And it was a rather informal scene at that time of night, if your Honor please.

And he made notes of the examination as he went along. He made notes of the history. He made notes of his finding. And Mr. Danahar asked him at that time, when can I get a typewritten report. Dr. Lodico said that in view of the holiday weekend and his secretary having gone for the day he could not give Mr. Danahar a typewritten report, and we then arranged, your Honor, I arranged when we left Dr. Lodico's office at about 9:00 or afterwards, to take his notes, every note that he made during his examination.

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I took it with me that night.

I said to Mr. Danahar, I will photostat these the next morning and mail them to you, and he said, but then I will get them too late. I said I will photostat them Friday and if you can send a messenger over to pick them up Friday you will then Friday have a copy of every note that Dr. Lodico has made.

If your Honor please, I represent to this Court that what Mr. Danahar has marked as Exhibit 11 for identification is a full a complete copy of every single note of every finding made by Dr. Lodico on his examination, and there is nothing further beyond that. Nothing at all. I just don't understand --

THE COURT: When you say, nothing further beyond that, you mean he is going to testify to nothing beyond that.

MR. COHEN: I am going to ask him questions along some of the lines that Mr. Danahar asked Dr. Mauer questions, yes, but I am saying that as far as his written report goes, your Honor, I have nothing beyond what I have already given Mr. Danahar.

THE COURT: Yes, but Mr. Cohen, I should certainly think that Mr. Danahar is entitled to know the extent of the testimony that your doctor is going to give. If he is going to include something over and above what is revealed

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in Exhibit No.11 marked for identification, then I certainly think Mr. Danahar is entitled to it, and knowing you as I do I don't think you would hold that back.

I think it is a right that you would want. You would want that in your favor. You would want to know what the witness is called for, how far his examination would extend. Am I not right?

MR. COHEN: Yes, your Honor. May I finish with this in response --

THE COURT: I think it can be supplied.

MR. COHEN: I think so, but that's one of the reasons I wanted to have a chance to talk to Dr. Lodico. I was hoping he would get here earlier and listen to all of Dr. Mauer's testimony.

THE COURT: Here is what I am going to rule: I am going to rule that the doctor will not be permitted to go beyond what is in the findings, or, in Exhibit 11 marked for identification, unless Mr. Danahar is apprised before the doctor takes the stand what over and above the material revealed in Exhibit 11 marked for identification is going to be covered by the doctor when he takes the stand. Agreed?

MR. COHEN: Yes, sir.

THE COURT: Is that understood?

MR. COHEN: Yes, sir.

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THE COURT: Does that sound satisfactory?

MR. DANAHAR: Your Honor, I still have to object for this reason: That even if I am apprised as of this late date, I do not have the opportunity to consider what Dr. Lodico might say. I do not have the opportunity to study whether there is any merit to what he might say, and I do not have the opportunity to discuss it with my own doctor. So I would have to object.

THE COURT: All right. Well, let's see whether or not what is revealed to you comes beyond the periphery of what you understand are the medical issues involved. If there is nothing foreign, nothing unusual and it is covered by your own contention, but maybe taking an opposite view, but it is material covered by you, then I don't see why you need to have any further consultation.

But, we are dealing right now with a cat in a bag. Let's see what the doctor has to say in the off the record discussion that Mr. Cohen is going to have with him, and then Mr. Cohen is going to impart that to you.

MR. DANAHAR: All right.

THE COURT: Now, subject to that then we take it that the plaintiff's case is in; is that right?

MR. DANAHAR: Well, your Honor, I --

THE COURT: In other words, Dr. Lodico is not your

witness, he is the witness for the defense. You were just giving him the courtesy of calling him out of turn.

MR. DANAHAR: Yes, sir.

THE COURT: The plaintiff rests. I do think I ought to make a couple of rulings, though, come to think of it, before you do.

Number one, there was a motion, you remember, Mr. Danahar, made by Mr. Cohen that we strike every reference throughout the entire trial record to fishhooks. You remember that.

MR. DANAHAR: Yes, I do.

THE COURT: I reserved decision. After having considered it I am granting the motion, and the jury will be instructed to disregard everything relating to fishhooks.

You remember also that there was offered in evidence Mr. Rankin's written report marked in this trial, Exhibit D for identification, and in his deposition it was marked Exhibit No.2 when he testified.

You know what paper I am talking about.

MR. DANAHAR: Yes, I do, your Honor.

THE COURT: And you objected to it.

MR. DANAHAR: Yes, your Honor.

THE COURT: You remember? The objection is sustained. It will not be received.

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Now, those are the two rulings that I held in abeyance, and I am now pronouncing the Court's rulings with regard to each.

Now, the plaintiff's case?

MR. DANAHAR: Your Honor, I submitted at your chambers this morning a case which I told your Honor that I was going to do on this question of fishhooks. I don't know whether your Honor has had a chance to look at that case or not.

THE COURT: Well, what does it say?

MR. DANAHAR: It says that, in that case it was held that a crew member who had gotten his hand caught on a wire without any specific evidence of what it was, whether it was a fishhook or a burr, or a splinter, that the vessel was unseaworthy.

There was no direct evidence of what it was that caught this man's hand. The case is almost exactly in part with this case here.

THE COURT: Let me examine it. If it supports what you say I may take a different position; if that is the law I would have to take a different position. So we will have to recess in order to determine that issue.

Suppose we take a short recess? Besides that, there is nothing further, that is the plaintiff's case;

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am I right?

MR. DANAHAR: That's right, your Honor.

THE COURT: All right. Then that is the plaintiff's case subject to the ruling with regard to fishhooks, and I think Mr. Cohen ought to be given that case so that he can be ready to argue it when I take it up, and please, gentlemen, as expeditiously as you can get these two things accomplished: One, the conference with Dr. Lodico, and so forth that I have already announced and, secondly, the fishhook case.

MR. COHEN: May I just say in connection with the fishhook case, your Honor, I regret that he tells your Honor and me about it now when I have no access to a library. He spoke to me at home yesterday, he didn't mention the case so I could have found it yesterday.

THE COURT: All right. We will get it to you. We will give you ample opportunity.

MR. COHEN: Yes, sir.

THE COURT: Recess.

[Recess]

[In the robing room - counsel present]

THE COURT: Mr. Danahar doesn't seem to get the point with regard to fishhooks at all. Mr. Cohen's motion to strike was based upon the position taken by him that

the total trial record is devoid of any testimony that there was in fact a fishhook or fishhooks in the cable that was being fed to the drum by the plaintiff.

The plaintiff was extremely careful when he came to testifying on that score. He said he didn't see any. He even went so far as to say he didn't feel any. He said that it must have been a fishhook. There was no other proof on that score. None whatever.

What does Mr. Danahar do? He gives us cases in a last minute request to charge which was delivered a minute or two before I was due to come down here to continue with the trial at 9:30 which are exactly in support of the Court's position, because in those two cases cited the Court found as a fact that there was a burr, or a fishhook, or some impediment. It was a finding of fact predicated upon evidence of an affirmative nature that was introduced into the trial record.

So it comes about that we find in Sandoval, the case reported in 460 Federal Reporter, Second Series, we have got this language:

"The District Court concluded that a splinter, or burr, existed in the steel cable and that the defect rendered the vessel unseaworthy."

In other words, it was found to be a fact that

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there was a burr that constituted a defect. There was evidence that there was a burr. There is no evidence here that there was a fishhook.

Then in the Clark case, 430 Federal Second, 1970, we find this language:

"Plaintiff's testimony consumed some forty-five pages," and so forth, "and only brief excerpts therefrom would justify a finding by the jury that the cable was defective in that a strand, or strands of it were broken."

You just bothered us unnecessarily, Mr. Danahar. I would like to add that we are going to stick by our ruling then, that all evidence in this case dealing with fishhooks is stricken, and is to be disregarded by the jury, and I shall now instruct them so.

With regard to the Rankin statement which I have ruled already is inadmissible, I would like to add in support of the Court's ruling the following cases:

Appelbaum against American Export Isbrandtsen Lines, 472 Federal Second 56, the Second Circuit, 1972; United States against Zito, 467 Federal Second 1401, 1403, Second Circuit 1972 and, gentlemen, by coincidence, Grunenthal against Long Island Railroad Company, 388 Federal Second 480, 483, Second Circuit where that similar issue was raised with regard to the position taken by Mr. Cohen

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as to the Rankin statement here.

At any rate, those are the authorities in support of the Court's ruling making Exhibit D marked for identification inadmissible.

Now, the plaintiff's case --

MR. DANAHAR: Your Honor, I would like to put something on the record, if I may --

THE COURT: Go ahead, sir.

MR. DANAHAR [continuing] in connection with your ruling as to fishhooks.

THE COURT: Yes, sir.

MR. DANAHAR: I would like to point out to your Honor that the record in that case discloses --

THE COURT: In what case?

MR. DANAHAR: In the Sandoval case, discloses that there was no direct evidence as to the existence of a fishhook, that the evidence merely showed that the party involved got his hand caught on a wire and that there was no specific and direct evidence that it was a fishhook, which I say is similar to our case.

THE COURT: Very well, sir. Is there anything else you wish to say?

MR. DANAHAR: No, sir.

THE COURT: The Court's ruling stands. I will ask

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you again, Mr. Danahar, is that the plaintiff's case?

MR. DANAHAR: Yes, your Honor.

THE COURT: All right. Make your motions.

MR. COHEN: If your Honor please, I would at this time renew all the motions I have made the other day before your Honor at which time I put my case on out of turn. I don't know if your Honor wants me to repeat all of the arguments.

THE COURT: No, you don't have to repeat the arguments, but I think you ought to state the grounds.

MR. COHEN: I move to dismiss the plaintiff's case at this point on the grounds that he has failed to make out a prima facie case for the same grounds as I previously indicated, to the effect that there is no proof whatever to show what caused this accident, and in the absence of any proof showing what caused the accident there cannot be any relationship between any alleged negligence on the part of this defendant and the accident.

I further move on the grounds that there has been no proof to show that the absence of a signalman at the doorway would in any way have affected, prevented this accident.

On the further grounds that there has been no proof to show that if another man had been operating the

handle of the tugger winch that this plaintiff, were he doing the same act that he says he was doing at the time of the accident, would not have suffered the same consequence. Because we say that was a careless act and an improper act on his part.

In substance, your Honor, I think what I am saying is that this plaintiff has failed to show that there was anything defective about the tugger winch cable or the wire -- I am redundant -- about the tugger winch or the tugger winch cable and has failed to show that any such kind of defect caused his accident and, hence, I submit that all that goes to the jury on this record at this time is a lot of speculation and conjecture.

THE COURT: Are you finished?

MR. COHEN: Yes, sir.

THE COURT: Denied on all of the grounds advanced.

Now, Mr. Danahar, here is 460, you read it, show me the language that you say supports what you contended just a moment or two ago that the record shows that there was no evidence at all on fishhooks (handing).

MR. DANAHAR: I don't say it's in the case mentioned -- mentioned in this case. I am talking about the trial record itself.

THE COURT: Did you examine the trial record?

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MR. DANAHAR: I examined brief that was submitted in connection with the trial record.

THE COURT: That is far from complete, isn't it?

MR. DANAHAR: In which the testimony was quoted as to this --

THE COURT: That is certainly far from thorough. There is nothing in the opinion, he admits that, he says he looked at a brief which quoted some of the testimony. How do you know what the total testimony was? All right, that is very insufficient. And, if I may say so, somewhat typical, Mr. Danahar, I am sorry to have to say it, but you press upon a Judge a case that you have not examined with greater care than that, I say that that does not become you and I am surprised that you would insist on it.

If you had taken down that record on appeal and fine-tooth combed it without leaving out a word, if you had examined the trial testimony from start to finish as that record on appeal would contain, then I would listen to you.

Let's go. Now, have you agreed on the doctor?

MR. COHEN: Yes, sir, I have advised him of the areas that I intend to elicit the doctor's opinion, and the doctor's opinion on those areas, yes, sir.

THE COURT: How do you feel about it, Mr. Danahar?

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MR. DANAHAR: This is what I have been advised, your Honor: That the doctor, in addition to testifying about his findings, is going to testify that the plaintiff will improve to a point where he can perform him normal work. But he does have a partial disability. And that this fracture of the wrist that he had had some effect on the healing of the prior condition that he had.

MR. COHEN: And the present limitations that he claims.

THE COURT: Let the record show what Mr. Danahar understands. And the present limitations, as Mr. Cohen said?

MR. DANAHAR: Of the wrist due to this fracture.

THE COURT: Subsequent fracture.

MR. DANAHAR: Yes, sir.

THE COURT: Of the wrist. Anything else, Mr. Danahar? Is that all, Mr. Cohen? Is that it?

MR. COHEN: That there is treatment that is warranted, and it will bring about an improvement.

THE COURT: Is that all right? Do you waive your objection, Mr. Danahar?

MR. DANAHAR: Your Honor, I can't waive my objection. I want my objection on the record.

THE COURT: Yes.

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MR. DANAHAR: I can't waive it.

THE COURT: In other words, what has been supplied to you you regard as insufficient?

MR. DANAHAR: Well, not just that alone, but it doesn't give me the opportunity to study this doctor's opinions, to form some basis for cross-examining him. It doesn't give me the opportunity to consult with my own medical expert to get some ideas from him. And it's on that basis that I persist in my objection.

THE COURT: Very well. We will receive the evidence and give you full opportunity of cross-examination.

Very well. Thank you, gentlemen. Let's go out. The jury is in the box.

[In open court - jury present]

THE COURT: Ladies and gentlemen of the jury, we have granted a motion made in behalf of the defendant to strike from the trial record so far all the testimony relating to fishhooks. Therefore, you will remove entirely from your minds and from consideration any and all references in the trial record so far to fishhooks.

This is equivalent to saying there is absolutely nothing before you about a fishhook or fishhooks in the cable the plaintiff handled in the cab body while performing his assignment on the day of the accident.

By so doing, however, we do not, of course, go beyond that in the least. We do not interfere in the slightest with your primary obligation of determining whether the defendant was negligent or its dredge unseaworthy.

Mr. Cohen, call your doctor.

MR. COHEN: Dr. Lodico.

V I N C E N T O. L O D I C O, called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. COHEN:

Q Dr. Lodico, are you a physician duly licensed to practice medicine in the State of New York?

A Yes.

Q Could you state for us please our medical training and education and your background and experience.

A Yes. I obtained my pre-medical education at Columbia University and received a B.S. degree in 1937.

I attended the New York Medical College, Flower Fifth Avenue Hospital, and received an M.D. in 1940.

I was licensed to practice medicine in New York State in August of 1941.

I had a two-year rotating internship at the city hospital, which is presently known as the Elmhurst Medical

Center of Queens.

I then had five years of a surgical residency training at New York Postgraduate Hospital, presently known as the University Hospital, affiliated with Bellevue.

Included in that time was one year of an intimate professional relationship with a former head of the AMA, a Dr. Charles Gordon Heyd. He was the clinical professor of surgery at the hospital.

After that I became an attending surgeon on the staff of St. Claire's Hospital in New York City and Columbus Hospital in New York City and, in addition, attending on the Fracture and the Orthopedic service of the Columbus Hospital.

I am a diplomate of the American Board of Surgery, a diplomate and fellow of the International College of Surgeons, fellow of the American College of Surgeons.

I hold a specialists rating for treating Workmen's Compensation cases in the State of New York. And I have the code letters of "SAC". The "S" stands for specialist, the "A" stands for major general surgery, and the "C" stands for major traumatic surgery, which is the surgery of fractures, dislocations, things of that type.

I belong to the usual national, state and local medical organizations, and presently am also part of the teaching

staff of St. Claire's Hospital teaching postgraduate surgery to the residents who are taking up that specialty.

Q Do you have a specialty?

A Yes.

Q What is that?

A My specialty is general surgery with an emphasis on traumatic surgery.

Q I believe you said that you were a diplomate of two different societies?

A Yes.

Q Can you please explain to the jury what one has to do to become a diplomate?

A Well, the most important is the American Board of Surgery, and that was set up throughout the country and in order for a doctor to qualify to take the Board examination he has to be a fully qualified surgeon with academic as well as clinical experience. After that he is invited to take a two part examination, and if he passes that, why, he is given his diploma stating that he is a diplomate.

I had to do the same thing with the International College. The other important body is the American College of Surgeons which is really the governing body of surgical practice and methods and standards in this country, and that, of course, you cannot be in unless you are a member of the

American College of Surgeons, and I had to take an oral examination with them, an interview, so to speak, and having passed that I was also made a fellow of that body.

Q Doctor, this past Thursday evening did I attend at your office together with Mr. Danahar and Mr. Anderson?

A Yes, sir.

Q At my request did you at that time conduct a physical examination of Mr. Anderson?

A Yes.

Q Do you have your notes of that examination?

A I do.

THE COURT: That was the first time you had seen the plaintiff in your lifetime?

THE WITNESS: That is correct.

MR. COHEN: May the doctor refer to his notes, your Honor?

THE COURT: Surely. If you have to, Doctor?

THE WITNESS: I do.

THE COURT: Go ahead.

Q Can you tell us, please, what complaints you received from Mr. Anderson at that time?

A If I may quote, "Patient gets pain in the left wrist when attempting to cock up the left wrist" in the manner I am demonstrating, "while raising a thirty pound weight

with one hand".

Q Can you tell us what that means in basic language, if you can reduce it?

A Well, Mr. Anderson --

MR. DANAHAR: Your Honor, I object to the doctor interpreting what that language means. That was the complaint he got and I think he should be limited to that.

THE COURT: Objection sustained.

MR. COHEN: I phrased it badly. May I rephrase the question, your Honor.

THE COURT: No, I think he ought to complete what he was told by the plaintiff.

Q Please continue, Doctor.

A "Gets crampy pain in the biceps area" which is the biceps muscle region that I am demonstrating "when picking up his child and holding it in his arm" in the manner that I am demonstrating "for about two minutes. There is pain in the left forearm when playing pool.

"He also indicated that he has permanent scars in the left upper extremity and he gets some pain in the left biceps and with shoulder motion. He had no elbow pain and he indicated that he could not flex his left wrist, and that he had abnormal sensation on the dorsum," which is the top of his left hand.

Q Doctor, can you tell us what -- I am sorry, did you finish with the complaints?

A Yes.

Q Can you tell us what medical significance if any a complaint of pain while raising thirty pounds of weight with the left hand and the left wrist represents?

A Well, the medical significance of that is that on lifting this weight and cocking it up, the wrist in this position, as he demonstrated to me, means that, number one, he is able to do that and, number two, that he developed pain on the dorsum of the forearm where he had his initial muscle problem when he got the wrist drop.

Q Now, Doctor, were you also given his medical history in the hospitals and were you shown the various hospital records?

A Yes.

MR. COHEN: If your Honor please, may I lead a bit to save time? Because there is no contest about the fracture of the humerus.

THE COURT: There is no contest about the fracture, there is no contest about the anatomical disclosures by Dr. Mauer; is that right?

MR. COHEN: That's right.

THE COURT: All right.

Q Doctor, you have been told and you knew that Mr. Anderson had sustained a fracture of the left humerus in an accident that occured on October 18, 1970; is that correct?

A Correct.

Q And you were told and saw from records that as one of the consequences of that fracture he sustained some trouble with his left wrist, he had a drop wrist; is that correct?

A Correct.

Q Could you explain that to us, please, how that comes about?

THE COURT: He already had the drop wrist before this accident, or am I wrong?

THE WITNESS: No, I don't think so, your Honor. The wrist drop resulted from the fact of the humerus.

THE COURT: In 1970, the accident in 1970.

THE WITNESS: Yes, sir.

THE COURT: But aren't you talking about another accident?

MR. COHEN: No, not yet.

THE COURT: I beg your pardon. Then I am mistaken. But wasn't there a subsequent claim, aren't you claiming that the plaintiff sustained another accident?

MR. COHEN: In 1972, your Honor.

THE COURT: Precisely.

MR. COHEN: Right. I am not into that yet, your Honor.

THE COURT: You are not into that. Then I beg your pardon. I wanted to be sure that I made the record clear that you are talking about the 1970 accident.

All right, Doctor, won't you please proceed.

A With the fracture that he sustained approximately in the mid shaft of the humerus, the radial nerve which crosses in a spiral, or oblique fashion from the back towards the front and goes to the muscles of the top of the forearm which allows the patient to cock up his wrist in this manner [indicating], this nerve was interrupted from a physiological standpoint, and the reason I use the word "physiological" is because I was not able to determine from the hospital record whether this nerve was actually cut.

You can actually interrupt the nerve so it doesn't work very much like it would be cut by bruising the muscle badly, and apparently that this fracture occurred this is what happened to the radial nerve that supplies the muscles on top of the hand, and in view of the fact that there is a dynamic tension between the flexes of the forearm that tend to bring the hand down in the fashion I am demonstrating,

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and the muscles on top of the hand which tend to keep it up like this [indicating], the loss of the tension of these muscles caused the wrist drop.

Q And you know, Doctor, do you know that there was an operation performed on Mr. Anderson in May of 1972 at the Public Health Service Hospital in Staten Island to correct that wrist drop situation? Is that right?

A Yes, I do.

Q Will you explain to us what that operation accomplished, please, Doctor?

A The operation which was performed on May 30,1972 tended to overcome the problem of paralysis of these muscles with the wrist drop, and they did a so-called Jones operation which very briefly they have removed the tendon of this muscle -- if I may demonstrate -- on this edge of my hand [indicating], and you can see the tendon over here, it's a hard tendon.

This is the flexor carpiomaris muscle, and this muscle, of course, is innovated by the ulnar nerve which is not damaged and, therefore, the muscle is intact.

They took this muscle and brought it around the wrist and attached it to the extensor, the common extensor muscles of the hand. I am clawing my hand so you can see the tendons. And it was attached to this area here [indicating], so that

when this muscle down here contracts it will pull up the hand, and that procedure was successful.

They also did a transfer of the palmirus longus tendon. I think possibly I am demonstrating it here [indicating]. It's a very thin, long tendon, and they transferred this to the base of the thumb here to allow the thumb to extend in this manner [indicating].

So that the purpose of that operation was to restore the cockup ability of the hand and, number two, to restore the ability to extend, or abduct the thumb.

These other motions, of course, were normal and, therefore, nothing had to be done to them.

Q Doctor, does the fact that on this past Thursday evening Mr. Anderson told you he is able to lift thirty pounds with that left hand, does that indicate to you that that operation was successful or not?

A It does indicate that the operation was successful.

Q Doctor, in connection with the fractured humerus, I would like to show you -- if I may approach the witness -- from the hospital records in evidence, Exhibit 8, these are the records of the United States Public Health Service Hospital in Staten Island. I would like to show you this particular page and ask if you would tell us please, Doctor, what that page represents in that hospital record [handing].

A This page speaks about two views of the left humerus and is dated January 8, 1974.

Q When you say speaks of two views, are they two X-rays reports taken of the left humerus just a month ago?

A No, they are two X-rays studies. One taking the front view in this manner [indicating], and the other one the side view so you can see the bone in two planes.

Q They were taken last month?

A Yes.

Q Can you tell us, please, what those X-rays studies show as taken last month?

A May I read?

Q Please.

A "There is an old healed fracture of the mid shaft of the left humerus with moderate callus formation and good union of the fragments in satisfactory position. The soft tissues appear normal."

There is also a description of the shoulder, and I quote, "No evidence of bony pathologic process of fracture is observed. The soft tissue appears normal. The joint space is maintained. Impression, negative examination of left shoulder."

Q Doctor, would you please tell us what is the most important function of the hand?

A The most important of the hand is the ability --

MR. DANAHAR: Objection, your Honor.

THE COURT: Objection overruled.

MR. DANAHAR: Wouldn't that depend upon the individual, what he was engaged in?

THE COURT: No, he speaks of generally. He is not asking anything specific.

Yes?

THE WITNESS: The most important function of a hand, of course, is the ability to grasp. That is the most primitive and the most fundamental.

THE COURT: All right.

Q Now, in Mr. Anderson's case did the injury that he sustained impair in any way his ability to grasp?

A Well, I would have to say yes to that, not from the standpoint that muscle or nerve --

MR. DANAHAR: I object to anything other than "Yes", your Honor. The question was -- the question can be answered with a yes or no, and I object to anything further.

THE COURT: No, the full answer must be given. The objection is overruled.

Go ahead, sir.

THE WITNESS: I am sorry, may I have the first question?

THE COURT: Yes. How far did the doctor go, please, Mr. Court Reporter?

[The answer was read]

A [continuing] Not from the standpoint that muscle or nerve going to these muscles was damaged, but because of the immobilization that was necessary for the fracture and for the correction of the paralysis of the muscles on top of the hand, the entire arm had to be put at rest. And of course when an arm is put at rest the muscles shrivel up. Therefore, when the arm was in a cast it developed weaknesses of the flexes of the forearm so there would be a corresponding weakness of the ability to grasp.

THE COURT: You are not telling us that you found anything to the contrary as of the present time, are you? Are you not saying they actually did find there was a weakness at the present time to grasp with the left hand?

THE WITNESS: Yes. I described it as a mild weakness when I saw it.

THE COURT: All right. Next question.

Q Doctor, let me show you another part of plaintiff's exhibit, again the records of the United States Public Health Service Hospital at Staten Island, and is there an entry there for August 3, 1972 regarding another accident that Mr. Anderson had [handing]?

A Yes.

Q Doctor, by looking at those records in your hands can you tell us what bones Mr. Anderson broke in this accident of August 3, 1972?

A This note indicates that he sustained a fracture of the distal end of the left radius and the navicular bone.

THE COURT: Well, tell us in simple language what that means. What was involved in that accident of August 3, 1972?

THE WITNESS: This note again indicates that this portion of the radius [indicating], which is the main bone at the wrist, was fractured at this point.

Now, immediately further down towards the hand is a small bone of the hand which is called the navicular bone, and this note indicates that this bone is also fractured.

THE COURT: All right.

Q In those hospital records is there any indication that any of the other bones in the wrist were fractured at that time?

A Yes.

Q Can you point that out to us, please, Doctor?

A The third fracture is a fracture involving the distal end of the ulnar, which is the small of the two bones

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at the wrist, and the tip of that bone was broken off.

Q What effect, Doctor, would those kind of fractures of the radius, navicular bone and ulnar have on a man's wrist and his ability to move in the various directions?

MR. DAHAHAR: May we say at what time, your Honor?

THE COURT: Yes, certainly.

Q At the time of the fracture.

A Well, at the time of the fracture he can't move it because it hurts him.

Q Dos the record indicate how those three fractured bones in Mr. Anderson's left wrist were treated?

A They were treated by closed reduction, which means reshaping the hand without doing any surgery on it and placing the hand in position of maximum function which is basically about what I am demonstrating now [indicating].

It's a cockup position of the hand. And they put on a long arm cast, which mean above the elbow.

Q Were you told for how long Mr. Anderson wore that cast following that accident in August of 1972?

A Yes.

Q For how long?

A Six weeks.

Q Now, Doctor, what effect on the healing process that was taking place following the operation of May 1972,

what effect on that healing process would this subsequent accident that occurred in August and the immobilization with the cast for six weeks have?

A Well, this will definitely retard the recovery of the muscle tone of the entire extemity. So that whatever process the patient had made in rehabilitating his extremity from the surgery then these muscles, because they are immobilized, would shrivel up again and, therefore, he would develop weakness on motion and limitation of motion. With also a weakness in his grasping power.

Q Doctor, in your years of medical practice have you had occasion to see and treat a goodly number of fractured navicular, radius and ulnar bones in the wrist?

A Yes.

Q On the basis of your experience, Doctor, do fractures of those bones generally leave a patient with some limitation of motion in the wrist?

MR. DANAHAR: Objection, your Honor.

THE COURT: Objection overruled. Generally, do they?

A Yes, sir.

THE COURT: Next question.

Q Can you tell us what --

THE COURT: But are there -- you must complete

the picture, after all -- are there instances where healing has taken place of those bones with the result that the patient is able to carry on almost to the degree of effectiveness that he enjoyed and was able to maintain before those bones became involved?

THE WITNESS: There are some cases where that definitely happens, and this applies particularly in the children where healing is just superlative.

THE COURT: How about adults, Doctor? I just want to know from your experience, are you telling this jury that when those bones are injured invariably and without exception there is no complete healing so that the former ability to carry on is almost as effective as it was before the injury?

THE WITNESS: There are varying degrees of healing, and there are some individuals who may go up to almost complete recovery.

THE COURT: Thank you. Next question.

Q Do you have an opinion, Doctor, whether in Mr. Anderson's case the fractured navicular, radius and ulnar bones in his wrist play any part in his present complaints of having limitation?

A Yes, sir.

MR. DAMAHAR: I assume this is restricted to the

wrist, your Honor.

THE COURT: Yes.

A The opinion is that following this type of fracture and immobilization there is some limitation of motion and some weakness resulting from the immobilization of that fracture.

In this patient it's somewhat difficult to evaluate, because he had problems before. But there is a certain amount of residual which is based upon experience wherein most adults do have some residual findings of varying degrees.

Q When you say in this patient it is difficult to evaluate, you mean you can't fix precise percentage points on it in this situation?

A I cannot, because he had problems before he got this fracture.

Q All right. Dr. Lodico, let me refer you once again, if I may, to Exhibit 8, the records of the Public Service Hospital at Staten Island, and I call your attention to this sheet dated January 30, 1974, labeled at the top, "Orthopedic Consulation."

Would you tell us, is that the latest report of an orthopedic consulation in the hospital records?

A Yes.

Q And according to this latest report of orthopedic

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consultation in the hospital record, was any treatment there indicated for Mr. Anderson?

THE COURT: Yes or no, Doctor?

A There is no recommendation for further treatment.

Q Doctor, may I call your attention to the very last paragraph.

THE COURT: It is in evidence. You may read it. I don't care. It is in evidence before the jury. There is no secret about it.

Q Doctor, can I call your attention to the very last paragraph in that report of orthopedic consultation and ask you once again, is any kind of treatment recommended there by the doctor?

A Yes.

Q What is recommended there by the doctor?

A He recommended isometric exercises.

Q What would isometric exercises do for a person with Mr. Anderson's condition?

A It would strengthen the muscles of his extremity, particularly the forearm and hand, to allow greater use and greater grasping power.

Q Based upon your knowledge and experience, and your examination of Mr. Anderson, would you also concur that isometric exercises would be worthwhile?

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A Absolutely.

Q Doctor, can you tell us in connection with pulling on a line, pulling lines like a seaman or a deck hand would do, can you tell us what parts, or what function of the hand is involved?

A Yes, I can.

MR. DANAHAR: Objection, your Honor. There again it depends upon a lot of variables.

THE COURT: Oh, sure it does. The jury heard what this doctor's opinion is as to the usage. Does it really make much difference from what he is able to do pulling a line if he is not able to do something else? That is an important phase of the totality of his work.

MR. COHEN: Right. I wanted to cover each of the few phases, if I may, your Honor.

THE COURT: Go ahead.

Q What function of the arm and hand is involved in pulling a line?

A Basically you involve the muscles of the hand that allow to make a fist. And also the flexors of the forearm, which also go into making a fist. Plus, of course, the use of a shoulder girdle and the biceps in order to pull.

Q Doctor, in your opinion would following up the

prescribed isometric exercises by Mr. Anderson improve his condition to the point where he could have those functions restored to his arm so he could pull on a line?

MR. DANAHAR: Objection, your Honor.

THE COURT: Objection overruled.

MR. DANAHAR: We have no idea what these isometric exercises are, even.

THE COURT: All right.

MR. DANAHAR: And I don't know how he can answer that question.

THE COURT: You have a perfect right on cross-examination to break it down, but this is a proper question on direct examination. That is his opinion. The ones who have to use their own evaluation are the jury.

All right, go ahead. Next question.

MR. COHEN: May we have an answer to that?

THE COURT: Yes.

THE WITNESS: I had better hear that question again.

[Pending question read]

A Yes.

Q Doctor, bearing in mind your experience and your examination of Mr. Anderson this past Thursday, and the fact that he told you at that time that he was able to raise

thirty pounds with his left hand, do you have an opinion as to whether his continuing at the isometric exercises prescribed would bring about an improvement in his condition so that he could operate the levers in a cab that controls a crane?

A I do have an opinion.

Q What is your opinion, Doctor?

A Well, I believe that the levers require less than a thirty pound pressure to move in any direction, therefore he could do it.

MR. DANAHAR: I object to the answer and move that it be stricken, your Honor. There is no testimony as to how much pressure is required to move these levers.

THE COURT: That is argumentative, and it is up to the jury. He says that is the reason he gives that answer. If it impresses the jury, that is one thing. If it doesn't impress them, they will throw it out.

Next question. The objection is overruled.

MR. COHEN: May I just collect my notes? I may be done, your Honor.

THE COURT: Yes, sir.

MR. COHEN: I have nothing further, sir.

THE COURT: All right. Cross-examination, Mr. Danahar, please.

CROSS-EXAMINATION

BY MR. DANAHAR:

Q Doctor, did Mr. Cohen show you Plaintiff's Exhibit 9 today?

A I don't know what that is.

Q Well, I show it to you now [handing].

MR. COHEN: I object, your Honor. That is only marked for identification. It is not in evidence.

MR. DANAHAR: I thought it was in evidence, your Honor.

THE COURT: No, that is not in evidence. Exhibit 9 is marked for identification.

He has a right to ask him whether you showed him Exhibit 9 marked for identification. Did he show you Exhibit 9 marked for identification, yes or no?

THE WITNESS: I don't recall that, your Honor.

THE COURT: Next question.

MR. DANAHAR: Well, I offer Plaintiff's Exhibit 9 marked for Identification in evidence, your Honor.

MR. COHEN: Objection.

THE COURT: Sustained.

MR. DANAHAR: Your Honor, may I be heard on that?

THE COURT: Mr. Danahar, I don't think you ought to. Come on up. Let us go into the robing room.

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[In the robing room]

THE COURT: Yes, Mr. Danahar? What do you want to say?

MR. DANAHAR: If your Honor please, I had placed Mr. Anderson on the stand --

THE COURT: I know all about it.

MR. DANAHAR: And he identified Plaintiff's Exhibit 9 as having been prepared by Dr. Miceli, the doctor who examined him, that he saw him prepare it, he saw him writing out what is contained on the exhibit, and that it was then given to him by Dr. Miceli.

I therefore think that on that basis it is admissible as a record from Dr. Miceli, who is a consultant at the Marine Hospital.

THE COURT: Are you through?

MR. DANAHAR: Yes, your Honor.

THE COURT: Mr. Cohen?

MR. COHEN: Your Honor, merely because somebody writes something out and hands it to a party involved in litigation does not ipso facto make it admissible in evidence. This is not part of the hospital record. I had no objection to any of the hospital records that were offered. This is a piece of paper that Mr. Anderson says Dr. Miceli gave him.

Judge, by that token any party could introduce

anything from any doctor he so desires and this doesn't make it admissible.

THE COURT: Didn't your doctor testify to the same effect as what appeared on Exhibit 9 marked for identification? Did he? Yes or no? Did he not say it's permanent?

MR. DANAHAR: Oh, yes. Oh, yes.

THE COURT: So what do you want? Do you want that to substantiate your own doctor? Is that what you mean?

MR. DANAHAR: Yes, I do. Because this consultant, Dr. Miceli, cannot be accused of being biased in any way.

THE COURT: Don't you think he ought to be subject to cross-examination? Do you think a piece of paper that he happens to hand in should be allowed to go in?

MR. DANAHAR: Judge, it shows that it's a form, a form from the United States Public Health Service, the name of the hospital is on here, the hospital registration number of the patient is on here, his name, the date that he appeared at the hospital, and it's signed by the medical officer who in this case was --

THE COURT: The difference here, Mr. Danahar, is that you do have, and you do not contest, an official document in form from the institution which does support testimony from the doctor called by the plaintiff to the stand with an ample opportunity that was afforded to you to cross-

examine him with regard to the permanency, and so forth. You have got the plaintiff saying that he saw the doctor who handed him Exhibit 9 marked for identification write what appears thereon. In that respect is there not more strength to it than to allow your objection on the ground that you assert to wipe it out? You have got something that you don't usually have. You have got the plaintiff saying, I saw the doctor from that institution write it. You have got the official form from that institution and, in addition, you have got the plaintiff's medical doctor testifying to the same effect.

MR. COHEN: If the plaintiff had seen Dr. Mauer write his report that would not make Dr. Mauer's report admissible in the absence of Dr. Mauer. And I don't dispute when he says he saw Dr. Miceli put those few words on that sheet of paper. I will accept his testimony. But that doesn't make that sheet of paper admissible. It's not part of the record of the hospital.

Now, why Dr. Miceli chose that sheet of paper to write it on instead of some other I have no way of knowing, but that doesn't make it admissible.

THE COURT: Doesn't that, by the way, Mr. Danahar, do not the words that appear on Exhibit 9 marked for identification differ from what your own doctor said were the

symbols that were used to express the same thought? They are not the same abbreviations that he said were present when he was the head of that department.

MR. DANAHAR: Well, this is a different finding, you see. He said that "FLD" meant fit for light duty. "FLD." And "NFFD" meant not fit for duty. This is permanent light duty.

THE COURT: All right. The Court will stick to its ruling that that is inadmissible. Exhibit 9 marked for identification is not admitted.

Now, gentlemen, while we are in here, in order to be able to figure out our schedule, Mr. Danahar, what is -- possibly we ought to talk off the record for a moment.

[Discussion off the record]

THE COURT: On the record.

It is agreed that summation will take forty-five minutes, and if counsel want a few more minutes it is agreed that that should be allowed.

All right, gentlemen, let's go ahead and finish the testimony.

[In open court - jury present]

THE COURT: All right, Mr. Danahar. Cross-examination.

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CROSS-EXAMINATION CONTINUED

BY MR. DANAHAR:

Q Doctor, you have testified about this second accident of Mr. Anderson which occurred in August of 1972 when you say the record showed he sustained a fracture of the radius and the navicular bone, and you also mentioned some other bone, didn't you?

A Yes.

Q What is that called, the styloid?

A The styloid process.

Q Do you consider that fracture of any significance in this matter, the fracture of that styloid?

A No. The styloid --

THE COURT: He just asked you, do you consider it of any significance.

THE WITNESS: Well, all fractures are --

THE COURT: Then the answer is, yes or no.

A Yes.

Q In connection with the disability that we are talking about here, do you consider that of any consequence?

A From a disability standpoint, no. It's the radial fracture that is the predominant fracture.

Q Now, you have reviewed the medical records from the Marine Hospital, haven't you?

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A Yes.

Q In connection with this matter. All of them, haven't you?

A Yes.

Q And you have found out that the cast that was put on for this fracture, this second accident, was removed within six weeks; is that right?

A Yes.

Q Did you see anything in the record after that time where he was treated for this fracture of the wrist?

A The arm was treated and, therefore, the treatment -- the answer would have to be the treatment was given for both conditions.

Q Well, can you point out anyplace in that record after six weeks where he was treated for this fracture of the radius and navicular?

A I just answered that. The physical therapy was given to the patient's arm to increase its strength and increase its range of motion. Since the fracture of the wrist does produce some loss of motion and some weakness, the physical therapy given in the first place for the prior fracture is also applicable to the wrist fracture.

Q But can you show me anything in the record after six weeks where there is any reference to being treated for

this fracture of the wrist resulting from the second accident, any physiotherapy with respect to that wrist?

A I thought I answered that, your Honor. If I see the record maybe I will --

THE COURT: Give him the record. Can you see anything in there that shows that kind of attention to the wrist? And I think you have already answered it. You said there isn't, but that there was therapy given to the arm and, therefore, you gathered that that would include the wrist; isn't that what you said?

THE WITNESS: That's the best answer I can give you.

THE COURT: All right. So there is nothing in that report that says specifically that there was therapy addressed to the wrist fracture.

THE WITNESS: I don't recollect that offhand.

THE COURT: All right. He says he doesn't recollect anything like that. All right.

Q You were shown, or, you referred to an orthopedic consultation which took place on January 30, 1974 when Mr. Anderson was consulted by an orthopedic specialist by the name of Dr. Miceli; is that correct?

A Yes, sir.

Q And you testified that he recommended isometric

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exercises?

A Right.

Q Did you also note that at that time he said he has no recommendation regarding medical care or treatment except for these isometric exercises?

A That's what Dr. Miceli said.

THE COURT: Yes, but he does so say, does he not?

THE WITNESS: Yes.

THE COURT: All right.

Q Did you also note that Dr. Miceli found that there was present some full weakness, some weakness in full extension of the left arm? Did you notice that?

THE COURT: Under that same date.

A No, I don't recall that statement.

THE COURT: Show it to him, will you please, Mr. Danahar?

Q And while I am at it, may I ask another --

THE COURT: No, sir. One at a time. Doesn't that appear there, Dr. Lodico?

THE WITNESS: I think he is referring to the shoulder in this thing here. He says, essentially there is free motion at the scapula humeral joint, which is the shoulder joint. Then he goes on to say, extension/flexion, although complete present some weakness at full extension.

I'm not sure whether he's referring --

Q Doesn't the record say that? That's all I'm asking you, Doctor.

A Well, this is what -- it's a little confusing to me. I don't know whether he is referring to the shoulder or whether he is going now to the forearm.

THE COURT: All right, that is his answer. Next question, Mr. Danahar.

Q Now, Doctor, incidentally, you are familiar with the procedure at the Marine Hospital, aren't you, when they call in a consultant to examine a patient?

A Well, I don't know what the procedure is, but I know they call --

Q You know they do that?

A Yes.

Q And in what cases do they do such a thing? Why can't they use their own doctors?

A Well, they do.

Q Then why do they call in consultants?

MR. COHEN: I object as to why they do that, your Honor.

THE COURT: Objection overruled.

A Dr. Miceli is a consultant at the Marine Hospital. Therefore, he is their doctor.

THE COURT: What does it mean when they call in a consultant is all he asks.

THE WITNESS: They want to have an opinion as to what this particular doctor thinks the patient has.

THE COURT: Next question.

Q You notice when Dr. Miceli examined Mr. Anderson on January 30th he complained at that time of limited motion of the left arm, weakness, pain on pronation, supination and marked weakness in his gripping and grasping and use of the hand.

Did you notice that?

A Yes.

THE COURT: What is the date of that, Mr. Danahar?

MR. DANAHAR: January 30, 1974.

THE COURT: Thank you.

Q Then after receiving that history Dr. Miceli went ahead and examined Mr. Anderson, didn't he?

A That's correct.

Q Then he concluded, "This patient presents a permanent partial disability of the left upper arm" isn't that correct?

A The left upper member refers to the whole arm as against the lower member, which would be the leg. What Dr. Miceli found is in the forearm and hand, that's where

his findings are located. He said the left should has free motion.

Q Wasn't the doctor, when he examined him, examining the left arm only?

A You see he's using arm as using an entire extremity. That's why he says, left upper member. But the findings are related from the elbow down. That's what he obviously is finding.

Q But if a doctor is examining a man's arm only, and he refers to the left upper member of that arm, isn't that this part of the arm?

A No, no, Mr. Danahar. The left upper member refers to the entire left upper extremity. Then he gets down to specifics and he talks about the forearm and hand where he has found defects.

Q Does he say anything in here about this fracture of the radius?

A I don't know. Let me check. No.

Q Is there anything in the consultation opinion expressed by Dr. Miceli saying that the fracture, that second fracture from that accident --

THE COURT: The accident of August, 1972.

Q [continuing] of August 1972 has anything to do with the permanent partial disability that he found in

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Mr. Anderson as of January 30, 1974?

A He doesn't mention it. Whether he thought --

THE COURT: No, please, Doctor. You are not supposed to volunteer. Is there anything there in that report of January of this year that says anything like that?

THE WITNESS: No.

THE COURT: All right. The answer is no. That brings us to the next question.

Q As a matter of fact, he says that this permanent partial disability is related to the episode in this folder, doesn't he?

A I don't know what he says. May I see it?

Q Yes [handing].

A Well, I don't know which episode. I presume he is referring to the --

Q No, I just asked you if he didn't say that there.

A Well, he says an episode, but I don't know which one.

THE COURT: Well, Doctor, is there anything in that -- rather, Mr. Danahar, is there anything in that exhibit dealing with the wrist?

MR. DANAHAR: I say there isn't, your Honor, and if there is I ask the doctor to point it out to me.

THE COURT: Doctor, examine it. Is there anything

relating to that wrist in that entire record?

THE WITNESS: It says nothing about the wrist.

THE COURT: All right. Next question.

Q Doctor, what are isometric exercises?

A They are basically exercises to increase the tone and volume.

THE COURT: But what are they?

THE WITNESS: Well, they are exercise where the patient actively uses his own extremities, hands, to strengthen the muscles.

THE COURT: How does he do it? Is that all you can tell us?

THE WITNESS: Well, if the people use -- they use tension apparatus, like grips, steel grips, or they may use rubbers, or all kinds of apparatus. But basically it is the patient using his muscles actively against some form of resistance to strengthen them.

Q Well, the lifting of a heavy wire that would be some form of an isometric exercise, wouldn't it?

A Technically, yes.

Q The pushing back and forth of a lever would be a form of isometric exercise?

A Yes.

Q Any grasping would be a form of isometric exercise,

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wouldn't it?

A Yes.

Q Do you know that Mr. Anderson since his operation of 1972 has been back working and has been doing, attempting to do the type of exercises that you have just described.

MR. COHEN: There has been no testimony that Mr. Anderson has been doing any isometric exercises of any sort, your Honor.

THE COURT: No, I think that question is entirely too general, because then you would have to go into all the kind of work that the plaintiff is doing as a handyman, really. That is what he is now. He is no longer a mate. He is a handyman, and that calls for washing windows, and so forth. Unless you go into great detail I see nothing to gain by that, Mr. Danahar.

MR. DANAHAR: May I have just a minute, your Honor?

THE COURT: Surely.

Q In connection with your examination you took no X-rays, did you?

A No.

Q You haven't reviewed any X-rays, either, have you?

A Not X-rays. Reports only of X-rays.

THE COURT: But you have not reviewed X-rays?

THE WITNESS: No, sir.

THE COURT: X-rays taken of this plaintiff, have you, Dr. Lodico?

THE WITNESS: No, sir.

THE COURT: That is all he asked you. Next question.

MR. DANAHAR: I have no further questions.

THE COURT: All right. Is there anything further, Mr. Cohen?

MR. COHEN: Just one or two, your Honor.

THE COURT: All right.

REDIRECT EXAMINATION

BY MR. COHEN:

Q Dr. Lodico, the entire Exhibit 8 in evidence are the records of the Unites States Public Health Service Hospital, are they not [handing]?

A Yes, sir.

Q Are those records kept chronologically?

A I would assume so.

Q And as one folder gets too thick they start another folder, do they?

A Yes.

Q This folder that Mr. Danahar showed to you referring to Dr. Miceli's consultation of January 30, 1974, is that the latest in sequence of this entire hospital record?

A Yes.

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MR. COHEN: Thank you. I have nothing further, your Honor.

THE COURT: All right. Step down.

[Witness excused]

THE COURT: Now, gentlemen, I take it that I can say to the jury that this completes the proof in the entire case on the part of the plaintiff and on the part of the defendant; am I right, Mr. Danahar?

MR. DANAHAR: Yes, your Honor.

THE COURT: Am I right, Mr. Cohen?

MR. COHEN: Yes, sir.

THE COURT: Thank you.

Now, ladies and gentlemen, that means that we have a little work to do that you people are not concerned with and, therefore, I say that the best thing to do would be for you to go to lunch.

It is approximately eight minutes after noon, and may I ask you to be back here promptly, ladies and gentlemen, at not a minute later than an hour and ten minutes? And come on back here, be ready. The lawyers have a great burden and they will have to sum up and the Judge will then have to charge you as to the law, and remember what I said, you are not to talk about the case in any way. Keep your minds open, and I thank you, ladies and gentlemen.

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Won't you please excuse the jury, Mr. Clerk.

[Jury leaves the courtroom]

THE COURT: Now, motions. Mr. Cohen, have you any motions?

MR. COHEN: I just renew the one I made earlier, your Honor.

THE COURT: Motion denied.

Have you any motions, Mr. Danahar?

MR. DANAHAR: Yes, your Honor. At this time I move for a directed verdict.

THE COURT: The motion is denied. We will leave the matter entirely to the jury.

Is there any other motion?

MR. DANAHAR: No, your Honor.

THE COURT: Very well. Well, gentlemen, will you please pick up your requests to charge, and you undoubtedly have seen your opponent's requests to charge.

I do say, gentlemen, I must comment on your requests. They are in order and they are in the main good and solid and applicable requests to charge.

The plaintiff's requests to charge, gentlemen, are granted in the main, and I think the best thing for the preservation of the record is to take up each one separately.

Plaintiff's request No.1 is granted; No.2, granted;

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No.3 granted; No.4 granted; No.5 granted; No.6 granted; No.7 granted; No.8 granted in substance; No.9 granted; No.10 granted in substance; No.11 granted; No.12 granted in substance; No.13 granted; No.14 granted; No.15 granted in substance.

All right now --

MR. DANAHAR: We have a stipulation as to life expectancy and --

THE COURT: I am dealing with requests now. You have already got that. It is forty-two years, isn't it?

MR. DANAHAR: That's working expectancy forty-two years, and we agreed on the life expectancy.

MR. COHEN: Wait. We agreed on working expectancy to age sixty-five, that's what he asked me to stipulate to this morning, and that's what I agreed to.

THE COURT: In your own requests you say forty-two years for life expectancy. That's what you say in your own requests.

MR. DANAHAR: Yes, sir, and that is an error, your Honor.

THE COURT: All right then, why didn't you say so? All right now, what do you say is the life expectancy? Isn't it awful that we have to refer to it several times and as of this hour, twelve minutes after noon, we haven't

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an agreement on it?

Gentlemen, I am not going to spend any more time. You will have to give me your answer by the time we meet this afternoon. I am tired of this sort of thing, and it really bothers me.

MR. DANAHAR: Judge, we did agree on it.

THE COURT: Talk to Mr. Cohen quietly, will you, right now and see if we can't get it off our minds and definitely settled?

MR. DANAHAR: I wrote it down, your Honor.

THE COURT: All right. You will find it later and after lunch give it to me.

Now we come to defendant's requests to charge.

No.1, granted; No.2, granted in substance; No.3, granted; No.4, granted; No.5, granted; No.6, granted in substance; No.7, granted; No.8, denied except as to improper use of equipment by plaintiff.

MR. COHEN: That is what I meant by that, your Honor. Yes, sir.

THE COURT: All right. So there it is.

Then the plaintiff's supplemental requests, No.1, granted in substance; No.2, denied; No.3, granted; No.4, granted; No.5, granted.

Now, that completes it. Except that what you

handed up today, is that in the form of a request or a memorandum, Mr. Danahar?

MR. DANAHAR: This is a supplemental request to charge; is that what you mean?

THE COURT: What you left in the chambers.

MR. DANAHAR: It's a supplemental request for your Honor to charge.

THE COURT: Besides that. I have already disposed of that.

MR. DANAHAR: Yes, your Honor.

Now, if your Honor please, if you will notice in my fifth request to charge I left out the amount that was introduced by Mr. Cohen in evidence of the benefits that had been paid the plaintiff.

THE COURT: I don't think that is necessary. The jury remembers, and I don't want to keep on making a big deal out of something that is really insignificant by comparison with the major issues to be resolved.

All right, gentlemen, please let's go and have lunch and let's come back and be prepared to talk plainly to the jury.

MR. COHEN: Yes. May I just voice my objection to plaintiff's supplemental request to charge, No.'s 3 and 4, and I request that in place of No.3 the jury should be

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advised and charged that there is no income tax to be paid on any recovery obtained by the plaintiff. I think the contrary impression is granted by this charge.

And in No.4, if your Honor please, regarding the computing of lost future wages, likelihood of wage increases can be considered, I would ask your Honor if he is going to charge that to also charge for reduction to present value of any award for future.

THE COURT: Of course. Of course. You are absolutely right on both. I don't intend, and neither did I gather that was the purpose or the intent of the two requests to which you have just addressed your remarks.

MR. DANAHAR: Well, your Honor, if you are going to charge on reduction in value, I would also ask you to charge on inflation, the possibilities of inflation in the future.

THE COURT: Well, where is the request to so charge, and why do you hurl it at me a minute or two before you are ready to go on for summation?

MR. DANAHAR: Because it was just brought up now by Mr. Cohen.

THE COURT: All right, gentlemen, you will go before the jury at the time I have already indicated.

[Luncheon recess]

[Time noted: 1:15 p.m.]

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AFTERNOON SESSION

2:00 P.M.

[In open court - jury present]

THE COURT: Mr. Cohen, would you be good enough to sum up for the defense.

MR. COHEN: Thank you very much, your Honor.

May it please the Court.

THE COURT: Counsel.

MR. COHEN: Mr. Danahar, Madam Forelady, ladies and gentlemen of the jury. At this point in the proceedings the attorneys are permitted to talk to you directly, and you should again bear in mind that what we say is not proof in this case. The proof I am sure you all remember. The proof must come from the witnesses and the exhibits in evidence. But we are allowed to talk to you and give you our views as to what the proof has or has not established.

You should also remember, I want to tell you this at the very beginning so we have no misunderstandings, that I am going to comment, as will Mr. Danahar later, about what various witnesses said.

Now, if my recollection of what a witness said is in accord with your recollection, fine. If I remember something and it is not the same as you remember it, be governed by your own memory. The same things applies for

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Mr. Danahar. In other words, what I am saying to you is that it is your task to remember what the testimony was. If I or any other lawyer, or anybody else should tell you that it was different than the way you remember it, don't take it from us, you go by your own memory. Do we understand that?

There may be, people do hear the same thing at the same time and have different recollections of it, and I am sure if that should occur it is entirely innocent and accidental. But it is just human nature. What I am telling you in advance so we get off with the right understanding is that you be governed by your own memory.

Now, this case I think you will see can actually be broken up into several different aspects. Let me tell you briefly how I view it. Mr. Anderson claims that he sustained certain injuries and damages on October 13, 1970. That is one part of it. He claims that my client was negligent. That is the second part of his claim. He claims that the negligence on the part of my client caused those injuries and damages to him. Third part.

What I propose to do is to discuss each part with you somewhat separately because I think they lend themselves to that kind of a discussion. So let's start with part one.

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There was indeed an accident on October 18, 1970, we have not denied it, and Mr. Anderson did indeed have certain injuries as a result of that accident. That is also not disputed.

Mr. Anderson sustained a fracture of the left humerus, in the upper part of his left arm, and he also sustained some injury to the radial nerve that reflected itself in a wrist drop of the left hand. There is no gainsaying that and we don't dispute that.

In order to repair that fracture an operation was performed and a metal plate with some screws that you saw on the X-rays were inserted, and that is to hold the bones together until they unite, join and form new bone. That was done. There is no dispute about that.

Within eight months or so after the accident Mr. Anderson did go back to work. He went back to work, I think he said in June of 1971, and he worked up until the time he went back into another hospital because they wanted to try to correct his wrist drop situation and they performed that second operation known as a Jones transplant, or something to that effect. It had the name Jones attached to it.

They did to a large measure, even according to Dr. Mauer, correct the problem with the left wrist, and then he stayed out until, well, he was out recuperating from

that when he had his other accident in August of 1972.

But, following that he later went back to work and has been working steadily since.

Now, what they are really going to claim here, and where there is a big dispute on the injury part of the case, they are going to claim that that injury is there, we agree, but that nothing more can be done for it, nothing at all, it is hopeless, and that there can be no improvement, and as a result of that I anticipate Mr. Danahar is going to stand before you in his time and start telling you how young Mr. Anderson was, how many years he has left to live and to work, and he is going to start with multiplication tables and start multiplying to come up to some very large figure and say that's his damages.

Now, let me preface this before I go into it, because this is important. How do you folks as laymen evaluate the conflicting testimony in the case? Because there has been a conflict. You are not doctors, you are not seamen, you have not worked aboard dredges. How are you supposed to evaluate it? The answer is, and this is the beautiful part of our jury system, you use your basic common sense. Each of you have grown up in this community, you have lived a number of years, you have dealt with people, you have made decisions almost every day of your life.

You size up situation. You size up people. You have acquired, you have to acquire basic common sense. Among the collective common sense of the six of you, one person may have, as he grows up, a certain slant or bias, but when you take a cross sample of the community, take six people with their living experience and their common sense and put them together and tell them to work out a verdict, chances are that they are going to end up doing the right thing if they apply their common sense.

Now, let's look at it from a common sense point of view. If they want you to believe -- and they have got the burden of proof, his Honor will charge you that later -- that there can be no more improvement to Mr. Anderson's hand, and that he can never do any heavier work than he is now doing, if they really wanted to prove that to you why didn't they call in those doctors who treated Mr. Anderson? Dr. Brigham, Dr. Levinthal, Dr. Frank, Dr. Wills whose name appears as the surgeon who did that transplant operation, who could tell you just what effect that transplant operation had, how much recovery it gave and what more could be expected in the future?

None of the doctors who had Mr. Anderson under their care for four years now, close to, were brought in this court to support this claim that they make.

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Instead they bring in Dr. Mauer who has an office in Queens near where Mr. Danahar's office is. He had some relationship in the past with Mr. Danahar. He had never seen Mr. Anderson before. Why that doctor? How does he come into this case all of a sudden when they have had so many doctors who have been taking care of him, treating him all the time?

Apply your common sense. Is it fair to infer that the doctors who have been taking care of him expect there to be an improvement? Of course there is. And the hospital records show it. But they don't want you to believe that because for the amounts of money that Mr. Danahar is going to ask you for he has to justify that by saying, there is a picture here of gloom and doom, there will never be any more improvement notwithstanding that we are dealing with a young man who is still getting medical treatment.

Here is, it is in evidence, the latest part of the record of the United States Public Health Service Hospital. Look, the first page is the certificate that it is a true copy, and right under that there is a listing of various dates. The last date is December 19, 1973. And this is the last part, you see the phrase "continue medical care." Nothing in here that says no more medical treatment because there is nothing more that can be done, which is what

Dr. Mauer tries to get you to believe. It's spelled out more specifically.

We come to Dr. Miceli, "This patient" this is Dr. Miceli's report of January 30, 1974, just a couple of weeks ago, and Dr. Miceli is on the staff of the physical consultants "This patient, left upper member, disrelated to the episode in this folder, aside from isometric exercises I have no recommendation regarding medical care of treatment."

Isometric exercises, and this is what Dr. Lodico also said to you.

Now, what is the problem here? The problem is a weakness, a difficulty in moving in certain directions. Has there been progress up to this point? Why, of course there has, from the situation where he had that drop wrist he has now progressed to the point where he told Dr. Lodico Thursday night that he can lift thirty pounds of weight with his hand.

I don't know if any of you folks have done any weight lifting or if you have any children who have done any weight lifting, but go back into your common ordinary daily experiences and appreciate what it takes to lift thirty pounds with one hand. That's quite a task, and it shows strength, not weakness. It certainly shows a progression. It certainly shows improvement from what the

condition had been before, and they are recommending isometric exercises, the hospital recommends it, Dr. Lodico recommends it, because you know that these isometric exercises where you are pitting your muscles against tension are going to strengthen the muscles, and as they strengthen you are going to be able to do more and more and more.

Now, don't misunderstand me. Please don't misunderstand. We are not saying that Mr. Anderson's arm is ever going to be the same as it was before the accident. Of course not. I am not here to say that to you. He has got the scars and he has got to be left with some partial disability. What we are saying is this: That the hospital doctors and Dr. Lodico are both of the opinion that further treatment will benefit Mr. Anderson, benefit him to the point where his arm and wrist will improve, improve to the point where he will be able to haul a line and manipulate levers.

That manipulation of levers as an operator reminds me of something I wanted to cover with you. You folks come to court, you are disinterested citizens, you don't know any one of us here. You have no axes to grind, you take an oath and you want to do the right thing. And I think it's incumbent upon the parties involved in a lawsuit, and the lawyers if they can, too, by the asking of questions,

but certainly on the parties involved in the lawsuit to give you a fair chance to tell you the things straight.

Now look how this damage claim has been colored, if you will. Mr. Anderson, the first few days on the stand, was telling you as I heard him that he had reached the point in his work where he was now being broken in as a crane operator. He had been up in the cab getting instruction. And they tried to give you the impression that within a relatively short period of time he would be a crane operator because they of course make more money.

This was the impression they sought to give you. But low and behold, when Mr. Ducey took the stand I asked him on cross-examination, they wouldn't even go into the subject, I said to him on cross-examination, "Had you yet started to break in Mike Anderson?" And he said, "No." So they are trying to give you a distorted picture, if you would.

Now, once again I am not saying that his arm will heal so that it will be perfect. I am saying that the hospital is recommending treatment because they feel that it is warranted, obviously, Dr. Lodico concurs, he believes treatment is warranted and will be useful to the point where the muscles, their tone and their vigor will increase so that he can handle lines and can manipulate levers,

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and certainly if he could lift thirty pounds with his left hand he is able to move levers.

Now, we have stipulated that because of the time out of work up to this point he lost approximately $11,000 in income that he otherwise would have earned.

We have also stipulated that because as a seaman he entitled to certain benefits of maintenance. He got approximately $3,000 that he otherwise wouldn't have gotten. His out-of-pocket loss up to this time is, therefore, about $8,000.

We however don't believe we are responsible for that item of his damage or for any other items of damage.

Now let's go to his charge against us that we were negligent, or that we failed to provide him with a seaworthy vessel.

He is blaming this accident upon Great Lakes, his employer. Now, there is no proof in this case that any of the gear or equipment that he was working with was in any way dangerous, defective or broken.

You know, if there was any dangerous, defective or broken condition in any of the gear he was working with we would have heard about it, you can bet your bottom dollar on that.

His brother was there, Ducey was there, there

was nobody that came to court and said that there was something broken, defective or dangerous, either with the cable or with the tugger winch or with anything else.

So, how do they claim that the employer was negligent? They go around to another theory. They say that this should have been a three man job. Now, let's analyze that and let's again apply common sense. Three man job. One man they say -- and what I have done, as you will recall, I have marked off twenty-two inches from the edge of the table to edge of this tape, because that is the size of this entire winch affair as reflected on this photograph which is in evidence [indicating], and the rotating drum itself takes up the first ten inches on the left of that, so I have set this jury wheel up there to approximate that rotating drum.

Here is the wire cable, this string, set up approximately the way they were talking about it, it feeds in under here onto the drum of the winch [indicating].

Now, some witnesses have said, only Mr. Anderson -- let me rephrase this:

Mr. Anderson has been the only one to say that this is a three man job. Mr. Ducey you will remember said it was a two man job. Let's take Mr. Anderson's contention. He says that it takes one man to hold the handle that is

on the right-hand side of the winch that you pushed in one direction or the other to control the rotating direction of the drum. And he says that's a job for one man, and that's all that one man should do.

He says you need a second man to stand on the other side of the wire and to guide or pat or touch the wire with your hand to spool it on evenly.

He says you need a third man over at the door, and to have one man do all these things is too much of a job for anybody to do.

Let me ask you this, and I am going to try to reduce this to basics, to things that you have experience with in your everyday life so that you can apply your common sense to it, because I don't think you should be overcome by the fact that this happened on the dredge where you never may have been.

The right way to do this job, as Capt. De Graff showed you, is you stand on the right-hand side of the winch, you work the handle with one hand, you have got your other hand completely free and it's no great task to operate this handle. You are never supposed to touch a moving wire.

Now, you know you really don't even have to have any experience on a dredge or anywhere else to see that it's dangerous to let any part of your body come in contact

with some wire that is moving and pulling into a winch. It's there. All you have to do is look at it, and it's obvious that you don't want to touch that, you shouldn't touch it.

Why? Here's a good instance. Look. Do you see this picture [indicating]? Here's a wire, it comes in with a loop around it.

Now, supposing you are not facing toward that but facing in a backward position like Mr. Anderson was on the wrong side of the winch with his body swung over like this [indicating] and his body was over the moving wire and with one hand he is trying to touch it, or hold it, and a loop like that comes along, it can grab grab you, it can knock your body down, it can knock you off balance. And, if the ship should give a little movement as a ship in water does, you know, they talk about sealegs, you are off balance and you are on top of this wire and you are being carried somewhere.

But, I am getting ahead of myself. Is it too much, the right way, the simple way, to operate the lever? There is a fairlead block that controls the even spooling on of the wire. You don't really have to touch it with anything.

If it should come on and not space across as well as you would like, what do you do? You pull the lever back

so the drum stops. Now, it stopped moving. Everything is safe.

By the way, when you are operating it from this side, the right-hand side rather than the left side reaching over, you can even stand back a bit from the wire. You don't have to be close to it. If you have to stop it to space it, Capt. De Graff says you stop it. Now it's stopped. Space it. Or back it off a little bit. Stop it again. Space it. Then proceed.

No danger at all if you do it the right way. But not the way Mr. Anderson elected to do it on this day. Capt. Wheeler, the Kings Point graduate, a man of many years experience on the water with winches also says this is the right way to do it. It's dangerous to stand on the other side. There is no need to stand on the other side and put your body over it.

We are saying that this accident happened because of Mr. Anderson's fault, his negligence. We regret it. Everybody is sorry about it. That doesn't resolve the issues for you.

Nobody comes to court with animosity. We all regret it, but that's not the issue before you because as Judge Cooper said to you at the outset, and you swore, even if he broke every bone in his body, if he doesn't prove

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that it was due to the fault of his employer as he claims, he is not entitled to any recovery against them. And you all agreed and swore to that.

Now, actions, I think, speak louder than words. If there were three men necessary to do this job they would have had three men there. Mr. Ducey tells you about this very, very -- I will leave out the adjectives -- Mr. Ducey tells you that suddenly just before this part of the operation was to begin Capt. De Graff came and said he wanted Bruce Anderson to do some painting work. And he took him away. And that he needed another man there in the cab Michael Anderson.

You say Capt. De Graff. He came to court. I had him come up from Baltimore. I want you to think about this. Mr. Ducey, Bruce Anderson, Mike Anderson, they are all still working around dredges, they still all belong to the same union. Capt. De Graff retired last summer, owes nothing to anybody. Retired. He could have stayed in Baltimore and I never could have gotten him up here. He owes nothing. Nobody has any strings or holds over him. But, he came up.

Do you think he came up from Baltimore to sit on the stand and lie to you? He came up and he told you, this is Sunday, they are not doing the active dredging work, they are in no rush for anything, they are doing maintenance

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repair work.

He told Ducey what the job was to be reversing this end for end, and then he goes into his cabin to do his paperwork, make out reports, and the next time he comes out is about 10:30 when Bruce Anderson is knocking at the door of the cabin to tell him there has been an accident.

He wasn't out on the deck having any such conversation with Ducey. And did you notice that after he testified on direct examination by me Mr. Danahar cross-examined him, and even Mr. Danahar did not have the temerity to say to him, "Capt. De Graff, were you in your cabin all that time? Didn't you have a conversation with Ducey just a few minutes before this happened?" Never asked him a single question about it, because he knew that man spoke true.

Now, let's assume another man was needed. Was there a man available? Of course there was. The engineer, Hebert What was he doing at this time? Nothing really of any great consequence or importance. Ducey said he had him down in the engine room doing some maintenance work on an engine. Well, you know, if you really needed a second man up there to do this simple task there was the man who could have come.

Nobody said to him he couldn't go. Ducey is in charge of the job. Why didn't he have Hebert come up if he truly believes a second man is needed? And what for?

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Because a second man isn't needed.

You know, when you drive an automobile, getting back to your everyday experience and understanding, when you drive an automobile, do you know what you are doing? You are operating the steering wheel with the hand, you have got a gearshift lever, you are using a second hand, you have got your left foot operating perhaps a clutch, you have got your right foot on the gas or a brake. You are paying attention with your eyes, you are looking at the road, you are paying attention with your ears, you are using all of your arms and legs and senses to operate a car.

It's a fairly simple thing. But they would have you believe that when you are working a winch like this one man can only stand by himself and use one arm on the handle, and that's all he can do, and if anything else must be done there has got to be more people.

That's all one man can do, use one hand on the handle, they would have you believe. I don't believe it. The witnesses have siad that that's not the case. If you ever have to guide a line while it's spooling on instead of adopting the procedure that Capt. De Graff told you about, what do you do? They have a device called a pinch bar, a metal bar. Why would they use a metal bar? Obviously because you are never supposed to put your body or your hand

in contact with the moving wire. You are not supposed to get that close to it. So if you wanted to use a procedure different than Capt. De Graff told you about, you would stand on the right-hand side, you would have your right hand, you push the lever in whatever direction you are pushing it, you would hold your hand on it, and with your left hand you would hold the bar and the bar would have one part of it on the ground, or the deck, and you would push it against the wire as it needed to be pushed in one direction or another.

Is that too much of a job for one person to do in a small confined area like this? We are not dealing with big monstrous machinery, although the angles of some of those pictures might indicate it. We are dealing with something that is twenty-two inches wide and only ten inches of it is round, rotating. And it's a one man job just to stand there with a pinch bar.

That's why they have pinch bars, so you don't put your hands against it. It's unsafe. But that's not what he did.

Now, how about the man at the doorway, the alleged third necessary man? Here is the doorway, it is marked with a "D" and it is over --

THE COURT: I am sorry, Mr. Cohen, but the record

ought to show what you are referring to.

MR. COHEN: Yes, your Honor is quite right.

Marked with a "D" on Plaintiff's Exhibit No.1.

THE COURT: And the other exhibit that you referred to?

MR. COHEN: The other exhibit that had the dimensions is Exhibit A-2.

THE COURT: Yes.

MR. COHEN: Thank you, your Honor.

There is a doorway, somebody said, and I forgot who, seven feet away over toward the left, and here it is, it is marked with a letter "D" in this photograph [indicating], and it's a doorway right on the front wall.

There is also another doorway in that cab, this is photograph 2-B, there is a second doorway as you see on the left-hand side of the cab that shows up in this picture, there is a doorway, and right next to it you see some windows outlined in white, and there is a doorway right there.

That second doorway does not somehow show up from the angle of this picture, Plaintiff's Exhibit 1, as it was taken, but you see the first doorway is seven feet away.

You need a man there. Why? To give signals. Well, what could that have had to do with this accident? Nothing. There were no signals that Ducey wanted to give.

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I asked him that on cross-examination. I said, "From the time that this operation began up until the time you heard Mike Anderson holler that he got hurt were there any signals that you on the scow had to give?" He said, "No."

So if there were no signals that he had to give, and there is no dispute about that, they never asked him otherwise, the signalman would have been standing at that doorway doing nothing. He would have been standing by looking out at the scow. He wouldn't even have been looking back at the winch. He would have been doing nothing.

So what does that have to do with this kind of an accident? How does the presence or absence of a man standing by the doorway with nothing to do have any relationship to the happening of the accident? But they throw it in because it's a little bit of a smoke screen. They can make it sound like this is a very technical complicated affair, and maybe you can get lost in it.

How did Ducey know there had been an accident? He heard Mr. Anderson hollering. Right? How did Capt. De Graff and Capt. Wheeler say the men would communicate? By voice.

And there is the perfect proof of it, the actions speak louder than the words. They can hear each other. It's a Sunday, they are not dredging, the big bucket isn't

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8:5

going up and down. It's a Sunday morning. They are doing maintenance work.

They heard, they could hear and in fact Mr. Anderson on his own deposition said that he was there, because he had to listen for the guys on deck. One of the things he was doing was listening for them, if there were any signals that they wanted to convey.

Now, is this too much to ask for one man to do? By the way, isn't it strange that with the doorway over there, which here in the courtroom would be down toward where the Judge is sitting, with the door in that direction and with Mike Anderson being interested in getting signals if any were to be given, isn't it strange that he would so position himself to do his job that his back is turned to that doorway? Because he is on the left-hand side of this tugger winch, his right hand and part of his body are over that wire, his left hand is holding, or patting, or doing something with the moving wire and his back is toward the place where he might expect some signaling to come from if there was to be any signal. Isn't that a strange, peculiar way for him to do his job?

Now, all I am saying is that using your common sense and applying it to the conflict in the testimony that exists I don't believe that it's been proven by quality

evidence that Capt. De Graff took a needed man away from Ducey for this operation. I think the evidence is clear that if there was another man needed he was available. Certainly in the engineer, Hebert.

But that in any event no other man was needed for this operation. If it were dangerous for somebody to do this operation unassisted, if it were dangerous for somebody to do it unassisted do you think that Capt. De Graff personally would do it right after there had been an accident?

Think about that. You saw Capt. De Graff. He is an elderly man who is retired. He was three and a half years younger at the time this accident happened. He certainly was not in the prime of health that Mr. Anderson was. Just compare their ages, if you would.

If there was a dangerous thing for Mr. Anderson unassisted, why would Capt. De Graff do it unassisted? And did he attack him in any way? Did he challenge him on cross-examination by saying, "Capt. De Graff, please, you don't really mean for us to believe that you did this all by yourself."

Not a single question. Not a single question. Because again this was the truth. This is the way it's to be done. One man.

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Now what we come down to is this, would that one man, especially after an accident had happened, would that one man have done that job by himself unless it were a job that safely and usually could be done by one man acting alone?

You know, when you listen to Capt. De Graff explain it and listen to Capt. Wheeler, they are saying the same thing. The reason for it being a one man job are very evident. It's really a simple job. You only really need one hand to operate that lever, never touch the wire while the drum is moving. If you have to correct anything, you stop the drum. Make your correction. Start it again.

Safe? Couldn't be safer. Why does he have his back turned? Because he said to you he never wants to step over the wire. In case he had to go to the door.

Let me ask you this: Let's look at that, supposing he had to go to the door for some reason, all he has got to do is pull the handle back, stop the winch, the wire is down low, I think at knee height or something like that, ankle height, stop the winch, step over, walk seven feet to the door, look out on the scow and say, "Hey, fellas," and tell them whatever you have got to say.

All right? I am saying that I commend to your common sense and experience that this is not a three man

job, it's a one man job. And the fact that one man is doing it is no proof of negligence on the part of my client.

I go further, and I have already touched on part of this, but if it were a job that required more than one man, that would not have accounted for the accident because as I have said a man at the doorway would not have affected the situation.

Let's assume that there was one man operating the handle and that Mike Anderson was standing on the other side of the wire as he was standing putting his hand on the wire. Run into the same problem. You are not supposed to touch the wire.

I'm not suggesting to you that that's the way this accident happened. We don't know. We weren't there. We do know that the claim they make against us is not well taken.

How did this accident happen? Here's what we think: Let me give you some physical evidence. Their claim is that Mike Anderson's hand got caught on the cable and he was dragged into the rotating drum.

Isn't it strange, hasn't it occurred to any of you that there were no broken fingers, there was no broken wrist at that time, no broken bones in the forearm, no broken elbow?

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Now, if the hand is caught on the wire cable that part is going in first. Wouldn't you reasonably expect if that's the way it happened, broken bones, fingers, at least one finger? A wrist?

How about this big elbow joint? The forearm? No, the break is up here [indicating].

How come? How come if it happened that way? Now you see, none of us were there when it happened. There was only one man there and we are depending upon his story as to what happened, and I have read his entire deposition word for word from beginning to end because I didn't want anybody to accuse me of picking and choosing.

You heard him say in that deposition time and again, "I'm really not sure what happened. I just don't know."

But at one point in his deposition significantly this comes out, now mind you this deposition was just taken this past December, and when he was being questioned about the condition of the cable he comes out with this, "No, I'm making no claim that I slipped, but you are --" let me go back. I started reading too late.

He says, when he is being questioned about the condition of the cable, "I can't say if I slipped, either.

"Q Can't say what?

"A Slipped.

"Q Are you making any claim that you slipped here?

"A No, I am making no claim that I slipped, but you are working in the water."

And I developed this with him on cross-examination. You are on a ship, it's in the water, the water and the ship in it are subject to the movement of swells of the wake cast off by ships that pass by. There is motion. You are not standing on land.

Why in the middle of a deposition when nobody is asking him about slipping or being in the water does he volunteer this kind of an answer? Is it a Freudian slip? Was this lodging in his conscience because he knew this is what happened? That he was in an awkward, improper position, that there was a lurch, some movement, that he was thrown off his balance and the upper part of his arm which is where the break was got caught in the winch or caught at the pinch point?

There's a flange that goes around the winch drum, and if you get pinched in there you can get your arm broken. Is that what happened? And is that why it comes out from his unconscious, so to speak, when he is not even being questioned about that?

Why should he interject when nobody was even asking him about it? Why should he interject about slipping and

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about working in water? Why? Why does that suddenly come to his mind? Because it's preying on his conscience? A Freudian slip?

And Mr. Rankin came to court. Two days after this accident he went to visit Mr. Anderson in the hospital. Let's see how this ties together. At that time Mr. Anderson was out of bed, his wife was present -- and by the way, she didn't come to court to contradict this, either -- and Mr. Rankin said that Mr. Anderson gave him a detailed story at that time as to what happened, and included at that time was the fact that the dredge lurched because of the swell of the water, and he was caused to fall into the winch.

Now, you see how from the beginning that story leaped out on a deposition when he wasn't even being asked about it, but what you see also is how the story has now changed, because they know that is a story that gives them no recovery.

They know that that kind of a situation is no one's fault but his own for adopting the position that he adopted, the highly unsafe and improper position to operate this winch.

So what I am saying is that physically you have the right to question how could a man's injury up in the elbow -- I'm sorry, higher than the elbow -- be sustained if his hand is going into a winch without there being any

injury to the fingers and the other parts of the arm that would have to go in first?

Think about it. Think about it and view it in context of everything. What we are saying is that by the actions adopted afterward by Capt. De Graff who operated this winch as an individual, by the physical facts surrounding what must have been, this is a very implausible type of claim that is being made.

Now, Mr. Anderson was hurt, there is no dispute about that. The extent of it is disputed. How long it will last is disputed. But, he did have an injury, and he did have to go to the hospital for a couple of operations. There is no doubt about that.

But we do dispute the claim that is being made here that that was due to our fault, that we were negligent or gave him an unseaworthy vessel and that that's what caused this accident.

As we view it based on the physical evidence, which is evidence not dependent upon the man's work or recollection so much, the physical evidence, what people did, how things happened, we say should indicate, should commend itself to your common sense that this claim that this accident happened due to our fault is not warranted.

I have exhausted my time. I just want to explain

one further thing to you, that I haven't in the time given me, and I am sure Mr. Danahar won't in the time given him, touched upon every part of the evidence or made every argument that we could think of or would like to make.

The fact that I haven't made an argument or stated a position that may commend itself to your thinking doesn't mean that I have abandoned it. If you can think of something that would help you in your thinking here, even though I haven't said it, you stay with your thinking.

Now, under our system I sum up first, Mr. Danahar gets the last word because he has the burden of proof, and just as he has had to sit by quietly while I summed up, so do I have to sit by quietly while he sums up.

The difference is that he now has a chance to answer the arguments I have made. I do not get a chance to say anything after he sums up.

So the fact that I don't get up to talk to you again should not be taken by you to mean that I couldn't answer or would have no answers to anything he may say.

So I ask you to do this for me, if you would, please: You have listened quite intently to what I said, I would ask you to pay the same patient attention to what Mr. Danahar says.

When you go into the jury room to deliberate think

about what each of us has said, weigh our respective arguments, decide it yourselves, use the collective wisdom of the six of you and if he says something that you are thinking about that gives you some concern, please, if you would, say is there something in the evidence that could answer that type of argument if Mr. Cohen had a chance, you know, to talk again? Search the evidence. Don't take what I say or what he says just because we say it. Search the evidence. If what we say makes sense and is rooted in the evidence, then fine. If it is not, then discard it.

Thank you very much.

THE COURT: Mr. Danahar.

MR. DANAHAR: Your Honor, may I have just one minute to go outside?

THE COURT: Surely.

MR. DANAHAR: Your Honor, may I go outside for just a minute?

THE COURT: Surely.

MR. DANAHAR: Thank you, your Honor.

THE COURT: Not at all.

MR. DANAHAR: May I stand here, your Honor?

THE COURT: Anywhere that will make you comfortable, Mr. Danahar.

MR. DANAHAR: Thank you, sir.

and whatever lost wages he has lost in the past or will lose in the future, and whatever permanent disability has resulted to him from this accident.

Now let us start from the very beginning. The proof shows that the plaintiff, at the early age of -- well, he had almost reached his seventeenth birthday and he left high school, he was in the second year high school which he did not complete, and he decided to go to work, and he worked for Great Lakes and went with Great Lakes Dredge & Dock Company as a sandbagger, I think was the first job that he had.

Then from that time on up until the date of October 18, 1970, when he had his accident, he worked almost continuously for Great Lakes.

There were some other companies that he worked for, but the major portion of his time was spent at Great Lakes.

Then we come to the date of October 18, 1970 which is the date of the accident. It was a Sunday. The men reported aboard the Dredge No.50, which was up here at Pier 80, North River, for their work.

They reported aboard at about 7:30. There was a six man crew aboard that vessel. You had the captain, you had the engineer, you had the operator, you had the mate

and then you had two deck hands.

The captain set out the work for the day. He said, "I want this closing cable," that I think you are thoroughly familiar with now, I'm sure, he said, "I want this turned from end to end."

In an examination before trial the captain was asked how many men were involved in this operation -- I think it is important that I read this to you because this is the captain testifying, he was in charge of the dredge, and here it is. As I say, this is important because it shows you what the captain's testimony as to how many men should be used in this operation was.

"Now, on October 13, 1970, the job that you had ordered to be done was not to change the whole cable, but to turn it around. How many men are used in this operation of turning?

"A The operator, mate and two deck hands."

So there you have the captain of the dredge stating that there should be four men used in this operation. The job was accomplished in sofar as they removed the closing cable from the drum in the cab and brought it down to the deck. Then it came time when they were to bring the other end of the cable back up through the crane and down into the cab.

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It was at this point that the captain for some reason decides to take Bruce Anderson, the plaintiff's brother, off the job. They had four men on the job up to that point. But the captain decides to now only have three men. So consequently Bruce is taken off the job and given some job of painting.

So you have Anderson, the mate and the operator left to do the job.

Now, it was interesting to listen to Mr. Cohen when he said, Mr. Danahar on cross-examination didn't ask the captain whether or not he had taken anybody off the job. I think it's more interesting that Mr. Cohen when he put Capt. De Graff on the stand as his witness didn't ask him point-blank, "Did you or did you not take Bruce Anderson off this job?" He didn't do that. And why didn't he do it? Would it be because the captain would say, "Yes, I did"?

So I think the burden was on him on direct examination to bring out that fact if it wasn't so that the captain had taken Bruce Anderson off the job.

Therefore we have this situation: They are now starting to bring this wire -- closing wire cable back up into this cab. There is your cab there [indicating].

THE COURT: Showing the jury which exhibit?

MR. DANAHAR: There is the cab [indicating],

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Plaintff's Exhibit 1.

THE COURT: Thank you.

MR. DANAHAR: As you can see it's in an enclosed space. It's almost like being in a room by yourself. You can't see out forward, you can't see to your right, you can't see out to your left.

Over here in the left-hand side of that cab you can see there is the letter "D", that's the door which would be over, say at the end of the jury box here [indicating]. Over here [indicating]. And Anderson is over here by the winch [indicating]. He can't see this way, that way, that way [indicating]. He can only see a little space where that door is.

Take this into the jury room and analyze it. So there you are, you have this man, this young fellow all by himself in this room assigned to operate this winch, to guide this cable onto the drum, to listen for signals out on deck in case anything should happen. So that he would either shut off the winch or whatever else was necessary in case he got some warning.

Now, the question presents itself, why, why was Anderson given this job alone? The answer is simply that they didn't have enough men to do this job. The captain took one of the men off the job. And consequently Anderson

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had to handle the lever, he had to guide the wire and he had to listen for whatever was going on out on deck so that if something should happen he should do something with this winch.

Consequently he was doing a three man job by himself, all by himself. His attention was not concentrating on what it should be on just the operation of this winch, he had to concentrate on the control of the winch, he had to concentrate on the wire itself and he had to have an ear perked up to listen for any signals that might come from that deck. Signals by yelling, no other way.

Now, while he was doing this, while he has the winch running in the initial operation when there are about two or three turns around it he is patting it, and suddenly his hand gets caught and it's pulled in.

Now, Anderson didn't say that his hand got pulled into the winch. His testimony is that it got pulled and he got thrown over the winch. So this business about Mr. Cohen saying that his hand should have been fractured, his fingers should have been fractured, there is no basis for that.

The testimony of Mr. Anderson was that when his hand got caught he was pulled forward and thrown over the winch.

Now, you recall that his Honor made a ruling this morning striking out certain testimony. I am not going to refer to the testimony, but I am just going to say this, that Mr. Anderson was very honest, he admitted in his examination before trial, and he admitted right here in court that when his hand got caught what it got caught on he doesn't know. All he said was that it got caught.

So you have here a young fellow who is being honest with you, he is trying his best to tell you what happened. He is not too articulate, I think you could observe that from the stand.

So if you feel in any way that he is trying to deceive you, I think from your observation on the stand you can see that he wasn't, he was doing his best to tell you just what happened here.

The defendant here has setup a smoke screen. I say it's a smoke screen. They have brought in this Mr. Rankin. Now, if you recall what Mr. Rankin in court here testified that subsequent to the accident he went over and visited Mr. Anderson at the hospital, and he asked him apparently about what had happened. Then he filled out an accident report. He took this accident report and he filled in item 25, item 25 which had been left blank apparently by the captain when he prepared the report.

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Mr. Rankin typed in in item 25 just what Mr. Anderson had told him as to how this accident happened. And it reads as follows: "Injured was engaged in changing holding cable end for end, his left hand was caught in cable and he was pulled onto and over the drum on which the cable was being wound."

Notice there is nothing in there about his hand being caught into the winch. Pulled onto and over the drum on which the cable was being wound.

Then I asked him in his examination before trial, and I am not going to read it to you -- oh, in court here he testified something about Mr. Anderson told him about lurching. So I confronted him with his examination before trial in which he had specifically stated that the only thing, the only thing that Anderson told him was whatever is contained in this report.

Despite that, despite that testimony under oath he came into this courtroom and told you that Anderson also mentioned something about the lurching of the dredge.

Then you have some other smoke screens thrown up here by Mr. Cohen referring to the fact that at different times when Mr. Anderson's deposition was being taken he mentioned something to effect that he didn't know how the accident happened. Well, I dislike taking the time, but

I would suggest to you that there were at least three, four, five or six different occasions, and you heard it when the deposition of the plaintiff was being read, there were at least that many occasions when Mr. Anderson specifically said, my hand got caught on the wire. And his explanation as to the other answers that he gave which he didn't correct, he had not been informed by me that he could correct them, his explanation was that he was scared and he was nervous. And I think as you observed him on the stand that isn't hard to believe, because I think he showed that very nervousness on the stand, plus the fact, as I say, he is not too articulate a person.

Now, as I say, in this case there are two claims of liability. Negligence and unseaworthiness. Now, we claim negligence based upon the fact that there was only one man assigned to do a job that three men should do. You heard the testimony of Mr. Anderson himself that whenever he worked as a relief mate there were usually five men on this job, two of whom were on the deck and three were up in the cab. One handling the winch, one handling the guide wire -- guiding the wire, and one standing over by this door which is shown in this photograph to accept signals.

The captain himself admits that there should be four men for the job. The captain also in his deposition,

I don't want to take time to refer to the particular page, but in his deposition he did refer to the fact that on occasions he has known of signalmen being up there with the operator of the dredge.

Capt. Ash, who was well qualified, has been in the maritime field for years, knows all about all kinds of winches. You heard his testimony. He also said that there should be three men up there. One to operate the lever, he has enough to do with just controlling the lever, the second one to guide the wire, and the third one to accept signals.

Now, Mr. Cohen has mentioned to you about common sense. Wouldn't your common sense, wouldn't anybody's common sense tell them that to do a job of this type in this room, in this enclosed cab where you are manipulating controls, where you have to guide a piece of wire around a drum, where you don't know what's going on on deck where the men who are on deck are on a scow, and this brings in this picture, Plaintiff's Exhibit 2-B. Here is your dredge, there is your scow, here is your cab. These man are down on the scow.

Mr. Anderson is up in this cab in the front of this cab, he can't see out of it at all. Wouldn't your common sense tell you that this is a funny way to handle a job of this kind, to have a young fellow -- and I might say

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an inexperienced fellow, after all, he has only been working for three years -- there is no proof in this case that he was ever told, for instance, that he shouldn't pat this wire. As a matter of fact, the captain said he has seen other crew members do the same thing.

So, wouldn't your common sense tell you that this is a heck of a job to give one man to do, control the winch, guide the wire, listen for signals? Isn't that an explanation as to why this accident happened?

This young fellow was trying his best to do a job, he is ordered up into the cab all by himself, he is handling the control. Admittedly he stood over on this side of the wire. Why? Because he wanted to be near the door so that he could run over and see what was going on on deck and get whatever signals might be.

If they had three men there, he stays by the control, you have got the other man holding the wire, you have got the man at the signal, and all he has to worry about is controlling that winch.

The fellow at the door, anything goes wrong on deck or down on the scow he gets a signal, passes it on to Anderson, and the operation stops, or whatever is called for.

Another thing, the man operating, or the man handling the wire, the cable Anderson's handling the lever,

if for some reason this man's hand gets caught he shuts it off, prevents any accident.

All of these things point to the fact that you should have three men doing a job of this kind. And what did they have? One man. A young fellow, inexperienced. And why? The captain takes one of the men away, his brother who could have been one of the men up there. He could have been the man that Mr. Ducey said. Ducey didn't say there should be three men. but he said there should be at least two.

The second man is up there, the one man stays at the winch, the second man stands next to him and guides the wire until he gets it started, then he goes over to the door to take signals.

Ducey said that. So you should have at least two men. But we don't have even that. We have one man, as I say, an inexperienced young fellow trying to do his best, he is ordered up there, he can't complain about it. He wants to progress with this company. He's not going to go against orders.

So he goes up there, he does the best he can, and what happen? He ends up with what you know he has ended up with. Serious injuries, a serious disability.

Why, even Capt. Wheeler, if you recall, he didn't

say on direct examination, but he did say on cross-examination that there should be some method, some method of signaling this man who was operating this winch in this cab. There should be some method.

We say the method should have been the man should have been at that door observing what was going on out on the scow, and giving whatever signals were necessary to Mr. Anderson.

Now, that basically is what our position is as far as negligence is concerned. We say that an insufficient help, inadequate help was given to Mr. Anderson to do this job. He was unable to concentrate as he should on the one job of operating the winch. He had to think of controlling the winch, he had to think of this wire, guide it onto the winch, he had to think of what was going on on deck.

He was unable to devote his attention to the one job that he should have had of just operating that winch, and because of that fact that is what caused this accident.

Mind you, there's no question about it that his hand got caught. What it got caught on is for you to decide.

Two days, two days after the accident when Rankin went to see him in the hospital he said, "My hand got caught on the wire." It's right in the accident report that it got caught on the wire. So as to what happened here that his

hand got caught, there is no dispute. What caused his hand to get caught on the wire, that's for you to decide on the evidence that has been submitted.

Now, in addition to the claim of negligence, as I said here, we are claiming unseaworthiness in this case. It's a rather peculiar word, I am sure, and I will leave it to his Honor to tell you exactly what we mean by unseaworthiness.

But, in any event, our claim of unseaworthiness is also based upon the fact that there was insufficient and inadequate help given to Mr. Anderson in connection with this job and an improper and an unsafe procedure was adopted to do this job by not having sufficient men in the cab to help him at the time this accident happened.

We claim that if you -- if this is substantiated and that it in any way is the proximate cause of his accident then we claim that the defendant was negligent.

Now, on the question of contributory negligence there is no question about it, and Mr. Anderson has testified that he was tapping or patting this wire with his left hand, with the palm of his hand. Patting the left side of the cable. There is no proof in this case from the captain, from the person next in line, the operator, or from anybody that he was ever cautioned about that, that he was ever

told that he shouldn't do that. There is no proof at all.

As a matter of act, the proof is the opposite, at least the proof is to this extent that the captain has said he has seen other men do the same thing, patting this wire. Mr. Anderson, a comparatively new man apparently has seen other men doing the same thing, so he did the same thing. Nobody told him he should do it. Nobody cautioned him about the danger of doing it. So I say he can't be blamed for what he did. He was following what others did, and the captain or his superiors never cautioned him that he shouldn't do anything like that.

Capt. Wheeler said that it's not necessary to pat the wire. It's not necessary because the fairlead should lead it onto the spool evenly.

Well, do you think for one minute that Mr. Anderson would be patting this wire if this thing was going around evenly? It must not have been going around evenly, otherwise he wouldn't be patting it. What would be the purpose? What would be the purpose of patting it if that was going around evenly?

Mr. Ducey said there should have been another man up there with Anderson to guide this wire onto the cable. Let Anderson handle the controls, another man to guide it. When you are finished guiding it on the wire, when it got

started go over to the door and act as signalman.

There is no testimony here to dispute that. And Mr. Ducey, mind you, he is still working for the company.

Mr. Cohen referred to the fact that Capt. De Graff is now retired, therefore you should accept everything that he says as the truth. But Ducey is still working for this company, but yet he came in here and in effect testified against this company. Doesn't that show that he is a man worthy of truth, that he wasn't afraid to get up on that stand despite what the consequences might be to him by Great Lakes for having said something that might be against their interest, but he took the stand and said there should have been at least two men up there.

Even Capt. Wheeler, if you recall on cross-examination, he admitted that this wire should go around this spool evenly, and I think he used the words "reasonably evenly."

The fairlead should guide it on there reasonably evenly. Then I said something to him, well, is there any harm -- I think his Honor brought up this subject about perfection -- is there any harm in a man trying to do a perfect job, and I think his answer was, no, there's no harm in that.

But the point is, if that wire was going on there evenly Mr. Anderson wouldn't be touching it.

We are coming back to common sense again. Mr.Cohen raised it, I am raising it. Is it common sense that Mr. Anderson would be touching the wire if it was going on there evenly? I say common sense says that it was not going on there evenly and he had to do what he was doing.

Now, Mr. Cohen referred to the fact that something Capt. De Graff had mentioned that all Anderson had to do was, if something went wrong, was to stop the winch, back it off, straighten it out and start it up again.

That very question was raised with Capt. Ash, if you recall. He said, you can never do anything like that, back off a winch, because if you back off that winch, when the cables are unevenly wound around there you are liable to cause a very serious accident out on deck because that wire might give suddenly, it might hit somebody on deck or on the scow and cause a very serious accident.

So, you can't back that winch off. That would be a very improper and unsafe thing to do.

Well, that in substance is our position in regard to the liability aspect of this case. Now I will go to the other issue that I mentioned, damages.

As Mr. Cohen has stated, there is no question about the fact that Mr. Anderson sustained this serious fracture of the left humerus and that he had multiple abrasions of

his left arm and he injured the radial nerve, or, there was something done to the radial nerve, and he developed this wrist drop.

He was taken to Doctor's Hospital, they couldn't operate on him. They had to wait a couple of weeks before they operated to let the skin on his arm heal and the swelling go down.

This is not my idea. If you take the hospital records into the jury room with you you can see that yourself. What I am telling you is right from the hospital record.

Then a plate was put into his arm, these screws, and after the operation he still had this very serious wrist drop.

Now, one of the items of damage is what pain and suffering has the man gone through? Now, may I have the hospital record from Doctor's Hospital, Mr. Cohen?

MR. COHEN: They are all over there [indicating].

MR. DANAHAR: I am not going to read from this hospital record except one part just to point up this matter of pain and suffering. I suggest to the jurors that you, when you go into the jury room, that you take this hospital record with you and thumb through the nurse's notes, and there you will see what type of pain and suffering Mr. Anderson went through.

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You will find that he was walking up and down the corridors of the hospital at night because of the pain. You will find that he was given medication constantly because of his complaints of pain. And this is the one part I am going to take the time to read from because I think it points up what I am trying to emphasize, and this is under the date of November 12, 1970, that's three days after he was operated on for his arm, and it's at 10:30 at night.

"Patient crying with pain. States left arm dressed feels tight and arm feels swollen. Dr. Pina aware. Patient pale and crying."

Here you have a twenty year old man crying because of the pain that he is experiencing. Now, there are no other references to his crying in the hospital, but there are many other references to the severe pain that he experienced while in that hospital.

Of course as the testimony shows, as Mr. Anderson has said, he has had pain ever since, perhaps it's not as severe as when that operation took place, but then you have this other operation in 1972. And the pain that's associated with that.

Now, his discharge from Doctor's Hospital where that first operation was performed on November 18,1970, his arm was in a cast and he had this wrist drop.

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Now, nine months later he returned to work, as a handyman, not as a deck hand. Although he did get deck hand's pay. But he returned to work as a handyman. And that's what he has been doing ever since. He is a handyman. He can't do the work of a deck hand. He can't do the work of a mate, a relief mate that he used to do, or steady mate, or operator.

He did his best with this wrist drop until finally he was admitted to the Marine Hospital over in Staten Island to do something about the correcting of this wrist drop.

Now, you heard this morning from the doctors what they did, they transferred the muscles back and forth, and so on, and consequently they eliminated this wrist drop and now it's up like this [indicating]. But he has other restrictions in that wrist as the doctors have indicated to you.

Mr. Cohen has indicated to you the amount of lost wages that we are claiming in this case up to the present time, so I won't mention that. But the point is after the operation in the Marine Hospital he then returned to work. He did have this second accident where he fell at home and he fractured a bone in his wrist. But if you look at the hospital record his present condition, his present permanent condition has nothing to do with that fracture that occurred

when he slipped at his home.

Dr. Lodico was frank to admit that the consultation report of Dr. Miceli and this record on which he refers as nothing in there about any permanent disability resulting from the second accident. Now it is our contention, or rather it is Mr. Anderson's contention, that except for this accident as he has testified he was a relief mate, but except for this accident he would have become a steady mate, and then he eventually would have become an operator.

Now, if you recall Mr. Ducey, the operator, said that he had observed Mr. Anderson since he came to work for Great Lakes, that he observed him to be a very competent, skillful boy, he was interested in his job, and he also explained to you how these men progress.

He said they observe the fellows, how they work, what interest they show in their work, and if they show an aptitude, then a recommendation is made that they be promoted.

In his case within three years they made a recommendation that he be promoted to relief mate. And it's not hard to believe that within short time after this accident he would have been a steady mate.

It is our contention that by this time he would have been an operator. The captain himself, if you recall,

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in his testimony said that he was a very competent individual. He knew his job. So on that basis we claim that by this time Mr. Anderson would have reached the stage on this dredge, or what other dredges the company has, where he would have been an operator, where his earnings would be substantially more than he is earning now.

Now, just on that issue if you recall, Mr. Ducey testified as an operator he makes $60 a day. Now, I have done some figuring here and you also recall his testimony that these men, they either work a six day week or seven day week. According to my computations on the basis of a six day week an operator who works for a year will earn approximately $21,500. If he works a seven day week he will earn approximately $25,000.

I say that the evidence shows based on Ducey's testimony, based on the captain's testimony that within a comparatively short time, if not by now, maybe a year or so from now, Mr. Anderson, except for this accident, would have reached the stage where he was an operator on one of these dredges.

There is no question that because of his age -- that's not a factor in determining, Mr. Ducey said, in determining whether a man becomes an operator. His education doesn't enter into it. It's just a question of observing

a man when he does a job, does he do it well, if he does, does it look as if he can do the job of a steady mate or operator, if he can, make the recommendation and it goes through.

Now, it is our position that because of Mr.Anderson's disability, you heard Dr. Mauer this morning, he said that this man has a permanent disability of that left arm, and that because of that disability he will never -- it's permanent, permanent means it can't be changed -- he will never be able to achieve what he was trying to achieve to become a steady mate, and then from a steady mate on to an operator on one of these dredges, which is the highest classification you can achieve next to the captain.

X Now, it's true Mr. Anderson has been taken back by Great Lakes and is working for them. He is working for them now. I wonder what their motive was in taking him back.

Here is a man after his first operation he has a brace on his arm with a wrist drop. But they take him back and let him work as a handyman. They know they owed no real debt to him. By that I mean he was only with them three years. If he was with them fifty years you could see how they would want to give him a break and keep him on.

But, they took him back. What was their motive,

do you think? Do you think it might have been so that Mr. Cohen could come in here today and say, oh, he's only lost approximately $11,000 in wages. Do you think that could have been their motive? Do you think perhaps after this case is over that maybe Mr. Anderson might find that he doesn't have a job as a handyman on this dredge?

MR. COHEN: If your Honor please, I have to rise to object to that. I think that is highly improper summation.

THE COURT: It is argument to the jury, and most of the summation is argument. The jury will make up its own mind on any points that are advanced.

The objection is overruled.

MR. DANAHAR: As I say, they are not indebted to Mr. Anderson in the sense that he was only with them three years. He is not one of their long time employees where you might expect such a consideration be given to an employee.

I question what their motive was in giving him this work, particularly when, as I say, he was a cripple in the sense that he couldn't even use his left hand to any great extent. It was in a brace.

Now, we come now to the question of what Mr. Anderson's damages are in lost wages. We know what they were in the past. What are they in the future? What are

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the prospects of the future? 849

Now, we have agreed, his Honor will charge you, that Mr. Anderson has a working expectancy of forty-two years. In other words, he is twenty-three years of age now, he will be sixty-five in forty-two years, so his working expectancy is forty-two years.

Now, he made, in 1973, he made $12,823 as a deck hand's pay. Let us assume that the average operator earns $22,823 a year. We claim that Mr. Anderson's loss for his future working expectancy is at the rate of $10,000 a year.

In other words, we say that by this time he would have been an operator, he would have been earning operator's pay, and that because of his injury he has not achieved that, he never will achieve it for the rest of his life, he will be relegated to the position of a handyman making whatever handymen make, and he might, due to inflation, get increases, and so on, but he will never achieve that difference between an operator and a handyman.

We say that is the rate of $10,000 a year. If you multiply that by forty-two, you come up with $420,000 that we are claiming he will lose in the future.

Now, leaving aside the question of his lost wages, Mr. Anderson is entitled to be awarded in damages anything you might find in connection with his pain and suffering.

Now, there is nothing specific that you can put your finger on. By that I mean it's not like lost wages, you know what lost wages are, the amount. There is no yardstick that is readily available that you can use in determining how much a person should be awarded for pain and suffering.

What it comes down to is, what is somebody willing to pay for a certain pain that they have? You take yourself, if you have a serious toothache you go to a dentist, you will gladly give him $10, $15 to get rid of that toothache, wouldn't you? Or if any of you jurors unfortunately have had gall bladder pain, which is a very severe pain, you will give anything to get rid of that pain. You will go to a hospital, you will pay doctors $400, $500 for an operation to get rid of that pain.

The same thing sometimes from appendicitis, which is very severe. Some of you jurors might have a backache, have had backaches over the years. What is that backache --

MR. COHEN: I think it is highly prejudicial to ask the jurors to put values on their own pains in the past, your Honor.

THE COURT: I think the most important point right now, is that you are coming to the close of your allotted time, Mr. Danahar, and I think the point you made just now that

the jury should consider an element of pain and suffering is quite clear to them without amplifying it in showing what they might get, and so forth.

Go on.

MR. DANAHAR: Well, in other words, when it comes time to evaluate pain and suffering you have to put a dollar value on it, that's the point. And that comes down to what you in your minds feel is how much is a day's pain worth? How much is a pain over a year worth? How much is pain worth over a period of a lifetime?

There has been testimony here that Mr. Anderson is going to have pain throughout his life with this condition. So you have to evaluate that.

Now, in connection with that we have also agreed that Mr. Anderson's life expectancy is, according to the life expectancy tables, 46.77 years. In other words, as of today he is expected to live another forty-six and some odd years, and we say that in computing this award for pain you have to take into consideration, or you should take into consideration his life expectancy.

As I mentioned before, the pain which is referred to in Doctor's Hospital, he has had two operations, he has pain while he is working. What is that worth? He has pain when he picks up his child, when he holds his child in his

arm he has pain.

As somebody has said, and hour of pain is just like a sample of hell. So you have to fix what is a reasonable sum to compensate Mr. Anderson for the pain that he has suffered in the past and he will suffer in the future.

Now, in addition to pain and suffering Mr. Anderson has a permanent disability, and he is entitled to receive an award for this permanent disability.

Number one, he has these scars on his arm. Well now, if this was a woman it would never be a more serious situation, no question about that. But he is a workingman. But, nevertheless, throughout his life, throughout his forty-six years, these scars are going to be a source of embarrassment to him. And that has a monetary value. So you have to take that into consideration in awarding damages.

I think I am about to finish, your Honor.

THE COURT: Yes, sir.

MR. DAMAHAR: There has been some discussion here about isometrics. Mr. Anderson testified that he has been doing isometrics ever since he had that second operation. He has been working. He worked all through 1973. What was he doing? Isometrics. Not in the sense of formal isometrics, but he has been trying to use this arm.

He has tried to help out on deck with the heavy

work, but he can't do it. But nevertheless that's the form of an isometric where he is pulling on a line and where he is sweeping and cleaning up. All of this is a form of isometrics.

He has been trying it, he has been following it, what the doctors have recommended, and up to this point there has been no improvement in his condition.

Now, in conclusion, if your Honor please, I just want to point out to you that this, I'm sure you realize this is a very important case from Mr. Anderson's standpoint. This is his day in court. He cannot come back tomorrow, the next day, a year from now and ask for something.

You have an awesome responsibility on your hands, ladies and gentlemen, just like we all have, Mr. Cohen, myself and his Honor, and it is now or never.

Mr. Anderson receives now or never from your hands what is justly due him as a result of this accident due to the negligence of the defendant in the unseaworthiness of the vessel as his Honor will explain it to you, and in this connection I can tell you that we have sued in this case for $500,000. That is what we have asked for when we brought our lawsuit, and I respectfully ask you to bring in a verdict for that amount.

THE COURT: The jury will take a short recess.

[Recess]

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[Jury present]

THE COURT: Please be seated Mr. Clerk. Remove all exhibits from the immediate area.

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Madam Forelady, ladies and gentlemen of the jury, I must apologize for a miserable cold which I will not allow to interfere with the work of the Court, but which may prove a little burdensome to you as well as to me.

I know that you can hear me, but I am croaking along and that isn't exactly the most pleasant way to listen.

This case has not taken very long to try. But, as I told you when you were being selected, every case on trial, whether it takes five days, five weeks or five months, and regardless of who is involved, is equally important under the law.

The best and most eloquent proof of that proposition is that I shall charge every word that the law demands in this case, even though it only took five days and it wouldn't be any different if it took five weeks.

In our system of judicial evaluation and disposition, every case is a big case. So I would be sadly remiss if I did not at the very outset of the Judge's charge to the jury express the Court's deep appreciation for the undivided attention that you have constantly demonstrated from the moment you took the oath. You care, and that is

the all important ingredient. You care about your mission. It is evident so far you have discharged your duty with fidelity, and I have every confidence that you will continue to do exactly that.

You have followed the trial with intelligent understanding and absorbing interest. I am quite certain that no single fact matter relating to the issues before you has escaped your attention. You have been silent throughout, and when your time comes to speak I have every confidence, and I am sure counsel on both sides join me in this, that in accordance with the solemnity of your oath and the high order of your conscience you will pronounce the justice that is due in this case.

Your selection was the result of great care exercised by the Court and counsel. Your mission is not easy. We are sure you did not expect it to be.

A distinguished philosopher, Albert Camus, a Nobel Prize winner, summed it up for all of us, for you, for the Judge, for counsel when he wrote, "Justice dies from the moment it becomes a comfort, when it ceases to be a burning reality, a demand upon one's self."

This is not a contest in salesmanship. It is not a battle of wits. It is not a clash of personalities. It is not a question of whether you like this lawyer or that

lawyer, or whether you like the Judge. What has that to do with it? Nothing. It is by law pronouced to be a conscientious search for the truth, and if you can leave this courthouse with the firm conviction that your verdict is consistent with the truth, then indeed your duty will have been well done because the only triumph in any litigated case, whether it be civil or criminal, is the triumph of the truth.

The truth is hard to come by. I explained that while you were being carefully selected to serve. That is exactly where your discernment, your ability to see through things, your experience in life, knowing the bitter and the sweet, the clean and the unclean, your innate sense that people of intelligence and understanding have, not necessarily equipped with formal education, that is not too important, but with an education in life. That is what you bring into the jury box. That all important decision making power which constitutes a great powerful arm of the law.

Every case on trial is a search for the truth. It is important to the persons involved, this plaintiff and this defendant. They are the ones we are concerned with exclusively. It is important to the community which in turn is deeply concerned that justice be done in each case.

Let me say a word about objections of counsel who have done their best to present the issues in conflict

between them, objections that they have interposed from time to time.

Please understand that counsel not only have the right, but it is indeed their duty on the offer of certain evidence to press whatever legal objections there may be to its admission. With these comments about counsel we leave them and we concentrate exclusively on the litigants before us.

My own determination evinced by me from time to time to have the testimony broken down into its simplest terms and to stick to the issues was solely for the purpose of enabling you to understand the full significance of the testimony and not to weigh you down with inconsequential material.

Under our system of justice the Court and the jury have distinct and separate functions to perform, each independent of the other to a large degree. When you were being carefully selected I emphasized then, and I emphasize now again, and you undoubtedly see it more forcefully now than you did then, that your power to do justice, provided it is lawfully exercised, is great indeed. I am not going to decide the facts, and neither are counsel. That is your burden. You have to determine where the truth is. I would not let anyone interfere with your function, you and only

you, not the Judge, not the attorneys, are the sole and exclusive judges of the facts, and that is your paramount duty.

You and only you, not the Judge, not the attorneys, determine the weight of the evidence. You and only you determine the believability of the witnesses, and only the jury can resolve such conflicts as there may be in the evidence.

It is my function to instruct you as to the law with respect to the claim that is here asserted. Each proposition of law that I give you must, not may, I said must, be applied to the factual situation to which it relates.

For example, if you regard as insufficient or unconvincing the evidence to which a given proposition of law applies, then just put the proposition of law aside. For in that event the evidence doesn't fit it and it doesn't fit the evidence.

You see, it is my duty to give you the entire law on every aspect of this case because I don't know how you are going to decide the facts. If on one given proposition, or one phase of the case you decide that the evidence is insufficient to be convincing, then the proposition of law that I give you with respect to that phase doesn't apply.

You just drop it. I can't go into the jury room and see how you are going to decide that particular phase, so I give you the law on every aspect of the entire case, and you apply each proposition of law to the facts as you the jury find the facts to be.

Let me give you an example. Under the law I must charge you as to the law with regard to damages. That does not mean that I think the plaintiff is entitled to damages. That is your decision, not mine. He may or he may not be. That, I repeat, is a decision that only you can make.

If you decide there is no case here, or you are not convinced of any liability on the part of the defendant, then you don't come to the issue of damages. However, if you determine the issue of liability is in plaintiff's favor, then you do go to the issue of damages and apply the law on damages as I present it to you in these instructions.

Suppose you decide he is entitled to damages? What are you going to do, come in here and say, Judge, what is the law on damages? Accordingly I give you the law on damages so you can apply it when, as and if you get to it. You may be surprised at this, but I have the power and the perfect right as a United States District Judge to comment on the facts. I can tell you what I think of each witness. I can say of a witness that I would not believe him under

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a stack of bibles, so long as I add that you are the final judges of the facts. I don't do it. Never have. For the simple reason that I believe that if a Judge comments on the evidence and gives his evaluation of it, even though he has a perfect right to do it, and just adds, but you the members of the jury are the final judges of the facts, that Judge's estimate will be adopted by at least one, and if a Judge is persuasive it will be adopted by almost all of the members of the jury.

I don't want to invade your orbit any more than I will allow you or anyone else to interfere with mine. So, since I have a perfect right to comment on the evidence, and I will not do it, you are not to infer from my voice or emphasis or explanation how I feel about the facts.

If I wanted to tell you I would tell you outright, because I have a perfect right to do it.

I have told you I have been on my own since I was a boy, and I have learned many lessons, and one of the most valuable is that when you have a perfect right to go up the front way, you go up that way, you don't go sneaking around the back.

Another lesson I have learned, and I pass it on to those who have not heard of it and those who have the burden of deciding the outcome of this case, always be

satisfied with the applause of your own conscience. I repeat, you can only do that which the facts and the law command. You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole and you are not to be concerned with the wisdom of the law, regardless of any opinion you may have as to what the law ought to be.

It would be a distinct violation of your sworn duty to base a verdict upon any other view of the law than that given you in the instructions of the Court.

Your oath compels you to apply the law regardless of your personal opinion as to the wisdom or the rightness of any part of it. It is unthinkable that a jury would do otherwise for that would be the same as a lawyer violating his oath for which he could be disbarred, or a Judge violating his oath for which he could be removed from judicial office.

In your determination of the facts you are to rely on your own recollection of the evidence. What I have said from time to time, or what I may say in this charge, or what counsel may have said during the course of the trial or during their respective summations is not to take the place of your recollection of the facts or the evidence in the case. Your recollection is paramount.

What have you before you? You have the trial record. Well, what is that? It is the sworn testimony of the witnesses. It is the stipulations or agreements that counsel saw fit to present to you and offer into evidence. It is the documents, the exhibits, all that was presented to you and that was admitted into evidence, and it also includes the Judge's charge. That is what you look to, not what might have been.

So you consider only the evidence in this case, and nothing else. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, the law says you are permitted to draw from the facts which you find to have been proved such reasonable inferences as seem justified in the light of your own experience and common sense.

If every little item is to be proven you would not have a human being, you would have a robot.

The burden of proof, as I shall emphasize later, is on the person making the claim. But the law does not say that a jury is denied the right to draw proper reasonable inferences from the facts that are adduced. I will develop that on another occasion later.

During the course of this trial I had passed upon questions concerning the admissibility of evidence and upon

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certain motions. You are to draw no inference or inferences from the Court's rulings on such matters or matter. That is of no concern to you.

Anything that was stricken you disregard completely and do not try to speculate what the answer would have been if the witness had been allowed to respond. Under our law then these litigants and each of them are entitled to even-handed justice. They stand equally before you. You must not allow sympathy, bias or prejudice to play any part whatever in your determination of the case. I distinctly emphasize that because if you do otherwise you will not be doing justice.

The fact that the plaintiff is an individual and the defendant is a corporation should not even for a moment enter your head. It has nothing at all to do with justice. If we mean to do justice equally to the black, to the white, to the yellow, to the poor, to the rich, to the successful, and to those waiting for success, if we are going to do justice to the ignorant as well as to the enlightened, let us stop giving lip service to it and do spadework.

So, ladies and gentlemen, out of the welter of testimony presented you must resolve what in the last analysis are the few crucial factual issues involved in this lawsuit.

How much proof must there be in a case of this kind to prove the claim? Must it be proof beyond a reasonable doubt? Absolutely not. That is the standard applied in a criminal case. This, as you know, is a civil case. Well then, how much evidence?

Well, the law uses the expression that the plaintiff must prove every element of his case by a fair preponderance of the credible or believable evidence. What does that mean? Firstly let me say to you that if you find that the proof fails to establish the essential elements of the plaintiff's case by this measure of proof, a fair preponderance of the believable evidence, then you must return a verdict in favor of the defendant, and that will be the end of the case.

If you find that the plaintiff has established by a fair preponderance of the credible proof a claim that he asserts, he is then entitled to your verdict.

Fair preponderance of credible or believable proof really means in essence the greater weight of the evidence on that point. That is not necessarily determined by the number of witnesses. It merely means that the evidence on behalf of the person on whom the burden of proof rests, and here it is the plaintiff, must be by a fair preponderance of the believable evidence. And that fair preponderance

of the credible evidence means further that it must have the greater weight, in your judgment, greater probative value than that which has been adduced in opposition.

It means that the evidence in favor of the plaintiff must have more convincing weight than that opposed to it.

Take the issue of the use of that hand, or that arm in the future. What about it? The plaintiff has told you the degree to which it will minimize his earning capacity. The defendant says, if you resort to appropriate exercises you will strengthen it and your use of it will increase.

Take all the evidence on that business, on that phase. Which is more true? Which is more likely true? Which position seems more credible, more believable, more convincing?

Another example that the Judge is offering you is an apothecary's scale, and, as you evaluate the evidence in going over the entire case, you place in one side of the scale the believable evidence in favor of the plaintiff on that particular point, and on the other side of the scale all the believable evidence in favor of the defendant.

That means when I say "evidence" not only the sworn testimony, it means the exhibits, the stipulations, the entire trial record, those portions of the entire trial

record that you regard as believable.

I go on and say to you, if after considering the entire trial record you are satisfied that the plaintiff's evidence in terms of quality and believability on each essential point as to which he has the burden of proof outweighs that of the defendant, just barely tips in his favor, not as in a criminal case where it must go all the way down, in a civil case the requirement is that it barely tips in his favor, then he has sustained the burden of proof which the law makes imperative.

If the scales are evenly balanced, then he has not sustained the burden of proof. He would have needed a little bit more evidence to make that scale tip in his favor.

Of course it is evident that if the scale tips evenly, and certainly slightly in favor of the defendant, judgment must be awarded the defendant. It has been well remarked that a party has succeeded in carrying the burden of proof on an issue of fact if after consideration of all the evidence in the case you believe that what is sought to be proved on that issue of fact is more likely true than not. More likely true than not. More likely true than the reversed, more likely true that his injury will be permanent. More likely true, etc., etc., with regard to each fact. More likely true than not.

But there has to be that degree of evidence to make you arrive at that test. I emphasize it because it is important that a jury recognize that in a civil case there is no need to prove anything beyond a reasonable doubt.

I want you to be sure you understand what a fair preponderance of the credible evidence means. It means just what I have said, nothing more, nothing less. One must not only look to apparently significant segments of credible evidence, but one must search for bits and pieces scattered throughout the entire trial record. And after having meticulously put it together, the question still remains, is the total proof thus gathered sufficient according to the measurement of proof prescribed by law to sustain the claim.?

If it is, the plaintiff is entitled to a verdict. If it is not, the defendant must prevail. Mere speculation or conjecture cannot be supplied in place of proof.

The mere fact that an accident occurred is no proof of either negligence or unseaworthiness. Accordingly, the fact that the plaintiff's arm became caught, etc., etc., does not establish that the defendant was negligent in its **use of that cable or that the ship was unseaworthy.**

In other words, the fact that an accident occurred establishes nothing by itself. What about these two

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theories? What about all of this negligence and unseaworthiness, and why is it all lumped here? How does it come about?

Well, a few words on that score I think will clear it up. I hope I manage to achieve that result. If after a conscientious appraisal of all the facts you find the defendant not responsible in negligence, or, and I emphasize "or", the vessel unseaworthy, both terms I will define later, you will return a verdict for the defendant and that ends the case.

But, if you reach the conclusion that the defendant was negligent, or, and again I emphasize "or", the vessel was unseaworthy, then the plaintiff will have established that phase of his case and you will proceed to inquire further as I shall indicate.

I told you already that the plaintiff comes into court asserting two theories. He says in the first place the defendant was negligent. He says in the second place that the vessel was unseaworthy. The plaintiff then by asserting these two theories does not maintain that he is entitled to two sums of money, one for negligence and the other for unseaworthiness. What he says in effect might go like this: The defendant was negligent, and its negligence resulted in my injuries, and if the jury and the law is in my favor, I am entitled to a verdict on the basis of negligence.

But, suppose I fail on that, then I ask for

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judgment in my favor on the basis that the vessel was unseaworthy. If the facts support him in that, he is entitled to a verdict even though negligence is not found.

In other words, when you come into court you set forth every possible theory of law on which you predicate your claim because you only have one bite of the cherry. You can't come into court on the basis of negligence and if you are defeated in that, come back later and start a new lawsuit and say, the vessel was unseaworthy. You put it into one ball of wax. And you can see why. Have you got anything to claim? Claim it all at one time and let the jury pass on the whole situation.

So that is the reason why the plaintiff comes in with these alternate theories, always maintaining, of course, that on the facts and on the law he has made out a claim under either negligence or unseaworthiness. The defendant, of course, firmly denies responsibility on either theory.

Now, what does the law mean by negligence? Let me first off say that as a general proposition if more than one man was required to do that job and the defendant knew it and you are so satisfied by a fair preponderance of the credible evidence, then in a word the defendant is negligent. Bearing in mind that general remark which I will amplify later,

look at what the law has to say with regard to negligence.

Before defining what the law means by negligence let me point out that plaintiff is not barred by the fellow-servant rule, that is, he does not assume any responsibility whatever for the negligence or any other form of fault committed by his fellow workers, you can't heap on him any negligence by any fellow worker.

Put another way, the negligence or unseaworthiness of the vessel is not excused merely because the acts of a fellow worker bring them into play, nor is any negligence or fault of his superiors imputed to him. If you believe the fault of the vessel in any respect, either by negligence or unseaworthiness, combined or concurred with the negligence of the plaintiff's co-employees or superiors, you must find for the plaintiff without any diminution in damages because of such concurrent fault.

Negligence, says the law, is the lack of due care under the circumstances. That is, it is the failure to do what a reasonable and prudent man ordinarily would have done under those circumstances then existing, or doing what such a person under those circumstances would not have done.

Just listen to this, I didn't compose it. It has been molded by Judges over the decades.

To reduce things to their simplest form is an

enormous challenge. Let me repeat that definition. Negligence, says the law, is the lack of due care under the circumstances, that is, it is the failure to do what a reasonable and prudent man would ordinarily have done under those circumstances, or doing what such a person under those same circumstances would not have done.

The plaintiff must prove the defendant was negligent by a fair preponderance of the credible evidence, as I have already defined that term. Ordinary care is that care which reasonably prudent persons exercise in the management of their own affairs in order to avoid injury to themselves or their property or the persons or property of others. Otherwise we haven't got a civilized community, we have got a jungle.

That thought was the test that the tribes of old resorted to in order to get along. Before there was written law, the essence of that thought was agreed upon.

You will note particularly that in determining the degree of care imposed by law on the defendant we mean the degree of care which a reasonable and prudent man in like circumstances would exercise in order to avoid injury. And of course when we speak of a prudent man it embraces, naturally, a corporation which can only act through its servants or representatives or employees.

We are talking about the circumstances on October 18, 1970 in that cab on that particular dredge at that particular hour, not some other vessel. That particular circumstance that existed where this plaintiff was engaged in undertaking to perform the assignment given. What would a prudent, reasonably fair employer have done under those circumstances? Send more than one? That in essence is the challenge to you. If it required more than one, and the evidence makes it out by the fair preponderance of the credible evidence, then the defendant was negligent in not doing what a prudent person would have done under those circumstances.

Do you catch my meaning? Do you get it, sir? Because I will explain it even further if I have to.

The same degree, of course, of reasonable care is applicable to a corporation, a mighty corporation, a little corporation, or a single person. And so you ask yourselves, does the believable evidence, in the total trial record before you, convince you by a fair preponderance of believable proof that in executing the ship's business there was a lack of due care exercised toward this plaintiff in the particular circumstances existing at the time. Not some other circumstances, not some other time. Under those identical circumstances, did the defendant exercise that

degree of care that a reasonably prudent person would have resorted to? More specifically, the ship owner's liability for negligence follows from the failure of the defendant, acting through its officers or ship's representative or anyone aiding the ship to perform any phase of its business, to do what a reasonably prudent person should have done under those circumstances.

You will consider in making this determination such factors as the area that the plaintiff was upon at the time of the accident. You will consider what the plaintiff was then doing at the time of the injury, whether plaintiff was placed in a dangerous or hazardous condition, whether proper safety precautions were taken so as to avoid injury, or to furnish a safe place in which to execute or carry on his work.

Accidents that result from momentary conduct usually present difficulty in describing with exactitude just what occurred. That does not by any means defeat the claims asserted, for the law permits the fact-finders, such as a jury, to draw from such facts as are presented, reasonable, fair and normal inferences. And, if warranted, conclude just what did happen to cause the accident, and the injuries directly resulting therefrom. That is what you were chosen

for.

Now, the amount of care may vary with the circumstances. For instance, you are driving an automobile on a superhighway. Certainly you have to be careful, but we are all agreed that the amount of care you must exercise on just such an occasion differs from the amount of care that a reasonably prudent person must exercise going down a play street where children are likely to dart out.

The amount of care in the latter instance, of course, is greater. So the law says it depends on the circumstances that exist as to the degree of care which must be exercised.

So, the greater the probability of danger in the circumstances, the greater is the degree of care that the law demands.

X Was this, as the plaintiff would have us believe, was he operating under conditions which were almost unnerving, if he is to be believed? The noise, the care which he would require, the man at the door? What about a pinochle game? No, there was danger to life and limb while that operation was going on. That is conceded by both sides, by every witness. That requires responsibility.

What went on in that cab affected the destiny of other human beings. Would you say that one person could

have done that? If you say so, that is the case. There was no negligence and as I shall point out later, under those circumstances there would be no unseaworthiness. I am trying to reduce to its simplest terms the things that you should consider.

The lawyers have pointed out their theories. I want you to think of other things, too. It is the plaintiff's case and he has got the burden of proof. He has to prove it.

Mr. Cohen for instance tells us that Mr. Ducey said he had no orders to give. Well, was there any proof that the plaintiff knew that Ducey didn't have any orders to give? Did Ducey ever say, "Hey Boy, I have no orders to give"? Or would you say from the evidence that the plaintiff had reason to believe that while he was operating in that cab there might be an order that has to be shouted? Consider every likelihood in searching for the truth. What I have suggested, what Mr. Cohen has suggested and what Mr. Danahar has suggested. But consider all these things. Under the circumstances here the ship owner owed to the plaintiff a duty to use reasonable care to see that the working area involved and all the existing circumstances at the time made it reasonably safe for him to be upon it.

Thus the ship owner was under the duty if there were any

dangers involved by the plaintiff being in the cab at that particular time it subjected the plaintiff to unreasonable or peculiar risks of injury which the ship owner knew, or in the exercise of reasonable care should have known or discovered, to take such steps as a reasonably prudent man would do to protect the plaintiff against such dangers.

Here the claim is that a reasonably prudent and lawful employer would have had more than one person to execute that job. And, as you will notice, negligence is one of the essential elements that must be proven by a preponderance of the credible evidence, notice, knowledge on the part of the defendant that the job required more than one person..

If you remember, there was testimony both ways. There was testimony by the plaintiff, as I remember it, and your recollection controls, that he had done this same kind of thing over and over and over again, and every time there was more than one person doing it. You have heard Mr.Ducey tell us the same thing that this kind of job required more than one person. You heard the expert for the plaintiff say that it required more than one person. Yes, and you heard the opposition say it only took one person to do it.

We will come to the motives for testifying at a later period of time which is something that you are to

consider. In simple terms, ladies and gentlemen, in determining the question of negligence the issue is whether the defendant exercised such care as a reasonable and prudent man would exercise under similar circumstances. I repeat, not under different circumstances, but **under those particular circumstances as they existed at the time.**

The only ground on which negligence and/or unseaworthiness is based is a lack of help and nothing else. There is no issue here as to **other rights, there is no issue he**as to oil or grease and dangerous this or dangerous that or other things, other than the one we are talking about. A lack of help for that particular job. Accordingly, in determining whether the defendant is liable on the ground of negligence or unseaworthiness, you may consider only whether the plaintiff was injured because of the defendant's failure to provide enough men to handle the task that the plaintiff was performing.

All the facts in the existing situation are to be appraised in determining the negligence if any of the defendant. It is for you alone to determine whether or not under the facts and circumstances existing at the time of the accident, and under the law applicable thereto, the defendant was negligent even to the slightest degree. That is the law. The slig'test degree. For by law that is

sufficient to hold defendant accountable on that element of the case.

In other words, it is for you to say whether with good reason the conclusion may be drawn that negligence of the ship owner played any part, I emphasize, any part at all in the injury.

The defendant's duties are measured by what is reasonably foreseeable, what the employer could have foreseen under like circumstances.

You will recall some of the evidence adduced, if you find it acceptable, indicates that the defendant knew the dangers inherent in the task plaintiff was assigned to perform, the extreme care of operating each instrument involved in the task under all the circumstances then existent, including the noise made by the machinery while plaintiff had to be on the alert for shouted signals, the failure to hear which might bring danger to the crew.

In measuring defendant's conduct here, the point of view to be taken should be the view before the mishap occurred to see what, in the light of the facts then known, should or could reasonably have been anticipated.

The fact that the work in progress at the time of plaintiff's accident was on a Sunday, when the regular work day operation was not being performed, has nothing to do

with the particular task plaintiff was performing. You have got to do the same thing on Sunday as you do on Monday or Tuesday or Thursday, for it required the same effort, the same care and involved the same dangers as were involved in that particular operation, on that Sunday or any other day. There is no testimony that I can recall to the contrary. If you do, then disregard the point, and you may disregard the point altogether. That is your province.

Applying this definition of negligence to the facts before you, **you must determine whether in executing the** ship's business there was a lack of due care in assigning to the plaintiff the task of operating the tugger winch in the particular circumstances existing at the time. In other words, under all the circumstances as you find them to have been would a reasonably prudent man have assigned that task to this **plaintiff** alone? The defendant had no duty, of course, to warn plaintiff of dangers which were obvious to plaintiff, or which he knew about. Defendant also had a right to assume that plaintiff would exercise reasonable care for **his** own safety and that, of course, is the law.

However, it goes without saying that if a person is assigned a task involving considerable danger, such as was given plaintiff on the day he was injured, and the task required more than one person to properly and safely carry

it out, the degree of care and caution normally to be expected of the one person so assigned is very likely to be less than would be expected of him if he had help in doing the job.

This, of course, is not to say that under such circumstances he is permitted to be indifferent or careless or negligent while going about his assigned task. The law expects him to do his utmost to exercise as much care and caution as reasonably would be expected of an able mate under those same circumstances.

We say two heads are better than one, so there are occasions where four hands are better than two. I must emphasize that the point I have just made applies only where a jury finds by a fair preponderance of the believable evidence that the task involved required more than one person to safely carry it out. Otherwise what I have just said doesn't apply.

With this in mind consider for a moment the testimony of the captain who said that after the accident occurred he finished the job by himself. Well, there have been contentions made by both sides in their summation. I give you other points to consider. The captain finished the job, but as I recall the evidence, the harder part of starting the cable under the drum had been completed by the plaintiff.

The captain was much more experienced, older and more powerful than the plaintiff. And you have to consider that, too, if you believe so.

There is no testimony as to whether his long life at this work had so accustomed him to noise that he was unaffected thereby. In other words, there was nothing to show whether this seasoned captain was affected in any way by the noise.

The test is not what the extraordinary person can accomplish when fulfilling an assignment; it is what the ordinary able man exercising reasonable care and caution can accomplish in carrying out the same assignment.

Further, immediately after any accident the human tendency is to apply maximum care and to tread much more carefully and cautiously than otherwise. That is another point to consider. All of which you may reject.

Although a seaman never assumes the risk of injury from any negligence of another, or from any unseaworthiness of the vessel, it is a fact of common knowledge that in almost every occupation aboard ship there is some inherent and unavoidable risk which does not arise out of either negligence of unseaworthiness.

A seaman when he enters upon his calling must assume all inherent and unavoidable risks of his occupation, as all

persons must, and no person may recover for injuries resulting solely from such inherent and unavoidable risks.

You must bear in mind, however, that this does not apply if despite the operator's diligence and care such risks, increased by reason of the failure, if you should so find, to furnish more than one man to perform an assignment.

Now we go to another point. The law concerns itself with proximate cause. Now, what does that mean? As used in law it means that the injuries sustained were the result of the accident and not due to something else.

You can readily recognize that the law emphasizes that before a plaintiff may claim damages he must show that the claimed injuries sustained resulted from the accident and not from some other cause or reason.

In other words, you must be convinced by a fair preponderance of the total proof presented of the existence of an unbroken chin of events flowing from the negligence, or the unseaworthiness, and leading to the injury. If a person is injured and says it was because of the negligence of the defendant, or because of the unseaworthiness of the vessel, he must not only prove it, prove the negligence of the unseaworthiness, but he must prove that the injuries that he sustained came by reason thereof and not from some other source. And, of course, he must prove that by a

preponderance of the credible testimony as I have already defined that term.

Let us go to unseaworthiness. What does the law mean by that term? Let me say a word right here that if you decide that the injuries to the plaintiff came as a result of negligence, and you find proximate cause has been made out by credible proof, you need not go to unseaworthiness because, as I repeat, proving either one, negligence or unseaworthiness, would entitle the plaintiff to judgment.

If you do not find in favor of the plaintiff on negligence, then you go to unseaworthiness and you test it out and see whether or not the evidence and the law with regard to unseaworthiness satisfies you that the vessel with respect to the area in question was unseaworthy.

What do we mean by unseaworthy? Unseaworthiness? Does it mean that the ship was falling apart? No, of course not. Unseaworthiness means a condition which, as I shall elaborate later on, produces injury.

For instance, a majestic ship, a veritable floating hotel, may be spic -and-span and gorgeous to behold, but if a, banana peel under certain circumstances causes a person to slip and break his neck, that ship is unseaworthy as to the injured person.

Unseaworthy in its entirety? Of course not.

Unseaworthy as to that particular feature or situation of which I have given you an example.

In other words, it really means that as to that particular factor, or situation, the ship was not worthy of the high standards at sea.

To put it another way, what I have just said to you means that while the rest of a ship may be shipshape, as to that particular area of the ship, however, it may be unseaworthy, which is another way of saying that it was not worthy of the best standards of the sea, standards which include orderliness, a good sense of craftsmanship and alertness to possible danger.

The law insists upon the observance of such standards. Under our law the ship owner owed to the plaintiff the absolute duty to keep and maintain all parts of the ship in seaworthy condition at all times. To be in a seaworthy condition means to be in a condition reasonably suitable and satisfactory for the purpose or use intended.

The doctrine of seaworthiness which I have just defined for you applies with equal force to a dredge and its crew. Under the maritime law every dredge owner or operator owes to every member of the crew employed aboard the dredge the duty to keep and maintain the dredge and all decks, appliances, gear, equipment of the vessel in a sea-

worthy condition at all times. The law demands the same standards of care regardless of the craft afloat.

It is unseaworthy if you give the man a tool which is inadequate for the purpose for which that tool is being applied. It is unseaworthy if you have a man do a job where you really should have more than one man do that job. And it makes no difference when it comes to unseaworthiness whether or not the owner knew about the condition or not.

I am sure the example of that shipshape majestic ship on which there was a banana peel that caused a holocaust to a human being, even though everything was beautiful and shiny, I am sure if they knew about it they would have it removed.

Now, you couldn't find them guilty of negligence because they didn't know about it, let's assume, but if that condition was there even though they didn't know about it, the law says the fact-finders may find that the owner had an unseaworthy ship in that respect and with regard to that particular injured person.

So, ladies and gentlemen, as a matter of law unseaworthiness extends not only to the vessel and its equipment, but to the crew as well. Even though fit and furnished for a particular task is itself sufficient, its misuse by the crew renders the vessel unseaworthy.

In the context of this case, assignment of too few men to the task of operating the tugger winch would be misuse of both the men and the equipment and, therefore, a condition of unseaworthiness.

Accordingly, if you find that the plaintiff was the only person assigned to the task of operating the tugger winch and that under all the facts and circumstances then existing with respect to its operation you are convinced that it was unseaworthy to allow only the plaintiff to perform that task, then as a matter of law the vessel was unseaworthy.

It is the jury, not the lawyers and not the Judge, **that determines** from the entire trial record, including evidence as to custom and practice, it is the jury, I repeat, **that decides** the issue of unseaworthiness.

Of course what is customary on other vessels is by no means a proper definition of what is reasonable prudence. A whole calling may have unduly lagged in the adoption of new and available devices or practices. Moreover, customs which are entirely reasonable under the ordinary circumstances which give rise to them in the first instance may become entirely unreasonable in the light of single fact altering the situation in the particular case. Beyond this, customs and usages themselves are many and various. Some are the result of careful thought and

decision, while others arise from the kind of inadvertence, carelessness and indifference that normally is associated with negligence.

I must emphasize that liability for an unseaworthy condition does not in any way depend upon negligence or fault. Even if the ship owner or operator had no knowledge, I repeat, no knowledge whatever, but if at the time when this accident occurred a condition existed which was unseaworthy as I have defined it, then the plaintiff may recover.

If you find the condition at the time was unseaworthy, what you are in effect saying is, we find the condition that existed was in contemplation of law unseaworthy even though the owner or its agents did not know about it.

So you have to decide whether or not by a fair preponderance of the believable evidence you are satisfied that the plaintiff has established that there was such a condition that made the vessel unseaworthy with respect to a cab that the plaintiff was in at the time.

You deal with the same totality of facts as you do with regard to the claim of negligence. The ship owner is liable for all injuries and consequent damage proximately caused by an unseaworthy condition existing at anytime, even though the owner may have exercised due care under the circumstances and may have had no notice, I repeat, or

knowledge of the unseaworthy condition which proximately caused the damage.

The duty of the ship owner to supply a seaworthy vessel is absolute. He cannot delegate it to anybody else. He cannot pass that responsibility on to others. A ship owner cannot relieve itself of that duty by transferring or shifting responsibility to another. Even if unknown to the ship owner or its personnel, the ship owner is nonetheless liable for any unseaworthy condition that is causally related to the injuries sustained.

Now, you may not presume unseaworthiness from the mere fact that Mr. Anderson sustained injuries. The plaintiff has the burden of proving unseaworthiness by a fair preponderance of the credible evidence, the same test by which he must prove the case dealing with negligence.

A condition of danger which persists for a substantial period of time, or even for a matter of minutes, can ripen into unseaworthiness. Liability for a temporary unseaworthy condition is no different from liability that attaches when a condition is permanent. Furthermore, liability for unseaworthiness does not turn upon the foreseeability of the exact nature and extent of the injury which does in fact ensue.

May I equally emphasize also that the ship owner,

says the law, is not the insurer of the safety of the plaintiff, nor required nor obligated to furnish a totally accident free ship, a perfect ship. The standard is not perfection, but reasonable fitness and reasonable safety. Not a ship that will weather every conceivable storm, or withstand every imaginable peril of the sea, but a vessel and a work area reasonably suitable and reasonably safe for intended use at the time and under the circumstances then existing.

The important test, in essence then, is this: You must determine whether, considering the time and place and the nature of the area where the plaintiff was at the time, the total situation was reasonably fit to permit the plaintiff to go about his task, go about being there at the time alone with reasonable safety. Absolute perfection, I repeat, is not required. However, it does require reasonable fitness for the intended use.

Whether a condition or set of conditions renders a vessel or parts thereof unseaworthy is a question of fact solely for you the jury. You must accept the Court's charge on the nature of this strict obligation and divorce your minds from any prior charges or appeals related to concepts of law where a person may be injured on shore. You must apply to the claim of unseaworthiness the identical doctrine

of proximate cause which I have already defined for you in that portion of my charge dealing with negligence.

Proximate cause must be established with regard to unseaworthiness, just as it must be in connection with the negligence claim. I have explained proximate cause for you already, and I don't think it is necessary for me to repeat it here again.

Ladies and gentlemen, we are going to take a few minutes recess. Announce it, Mr. Clerk.

[Recess]

[Jury present]

THE COURT: I want to talk to you about contributory negligence. What does the law mean by that? The defendant takes the position that the plaintiff brought on his own injuries and, of course, if the plaintiff did so and is solely responsible, then he cannot recover on his claim based on defendant's negligence or unseaworthiness. He is out of court. He is not entitled to a penny. It is as simple as that.

The defendant goes further and says that even if you do not find the plaintiff was responsible entirely for the injuries that ensued, you should take into consideration that the plaintiff was himself contributorily negligent. In other words, that what he did played a part, even though

the defendant was negligent, but the plaintiff's own negligence played a part in the result that ensued.

Contributory negligence is the failure on the part of an injured person to exercise reasonable care for his own safety which, cooperating in some degree with the fault of another, helps bring about the injury.

Plaintiff, in carrying out his assignment in the cab on the day of his accident, had a duty to act with ordinary and reasonable care, to take reasonable precautions for his own safety and to avoid unnecessary danger and act with that degree of reasonable and prudent care that the operation underway called for.

In determining whether plaintiff was contributorily negligent, you must consider that just as the defendant is required to use reasonable care to avoid injuring him, plaintiff is required, as his duty and as his obligation to defendant, to use reasonable care and avoid anything that will injure himself.

Likewise, just as the standard which the law demands of the ship owner is not perfection, but reasonable fitness and safety, so the law does not demand perfection of the worker. Just reasonable care, reasonable precautions and reasonable competence.

If you find that the ship owner was negligent,

or the vessel unseaworthy, you must then determine whether or not plaintiff himself failed to exercise that degree of care that a reasonably prudent man would have used under the same circumstances.

Accordingly, should you find that the plaintiff's injuries resulted in part or in whole from his own improper use of the ship's equipment, then to that extent and only to that extent the plaintiff would not be entitled to recovery.

Putting it another way, if you find that plaintiff's own negligence contributed to his injury even in the slightest degree, you must find that plaintiff was contributorily negligent. His claim against the defendant for negligence or unseaworthiness, however, is by no means extinguished if you find either claim sustained.

In determining whether the plaintiff contributed to the accident, you may consider whether what he was doing at the time was done in the normal and habitual way and whether he could have observed and he himself could have easily avoided conditions which he alleges caused the accident.

The test which you are to apply is reasonably this: Whether he was doing what a reasonably prudent worker engaged in exactly what the plaintiff was doing at

that particular time would not have been doing, or whether he omitted to do that which a reasonably prudent worker would have done at that time and under all those circumstances.

It might not be amiss if at this point we make reference to the tapping of the cable which the plaintiff conceded doing as he endeavored to get the cable wound around the drum of the tugger winch.

As I recall his testimony, remember, your recollection is paramount, Capt. De Graff stated under oath before you that tapping the cable was the almost invariable practice among the crew, even though he regarded the practice an unsafe one. It is for you to say whether what plaintiff did in this respect was contributory negligence, and if so to what extent.

You must, of course, ask yourselves whether this particular practice comes within the test of contributory negligence which I have just given.

Let me repeat it. In determining whether the plaintiff contributed to the accident you may consider whether what he was doing at the time was done in the normal and habitual way, and whether he could have observed and he himself could have easily avoided conditions which he alleges caused the accident.

If I may interpose this comment, as I remember

Capt. Wheeler testified that the tapping was to bring about a perfect winding, which is not essential, if you remember, and if I am not right you disregard my comments. But if I am right, then Capt. Wheeler said that what the plaintiff was doing was to achieve a perfect winding on the drum. One strand right next to the other. He said that goes to perfection, but not at all required.

The test which you are to apply is reasonably this: Whether what the plaintiff was doing was what a reasonably prudent worker engaged in exactly what the plaintiff was doing at that particular time would not have been doing, or whether he omitted to do that which a reasonably prudent worker would have done at that time and under all those same circumstances. Moreover, a seaman does not assume any risk of injury which results from his use of a known unsafe appliance or method, although he had a free choice to avoid the use of it. So said the Supreme Court.

Accordingly, if you find by reason of the particular winch then in operation that it was necessary for the plaintiff to tap the cable with his hand in order to more effectively wind it around the winch, then he cannot be held accountable for resorting to such a practice, even though he knew it was unsafe to do so and that a safer practice might have been available.

Of course in choosing to tap the cable with his hand the plaintiff was bound to act with a reasonable degree caution and care. Accordingly, if you find that in tapping the cable with his hand the plaintiff failed to act with that degree of caution and care then to that accident you may find him to have been contributorily negligent. Or, if you find that in tapping the cable he did that which was distinctly layed down as not to be done and that he nevertheless did it, and that the danger that was to follow therefrom you are satisfied by a fair preponderance of the credible evidence was something that the plaintiff knew about, then you have a right to determine whether or not what he did with regard to tapping the cable came within the area of bringing upon himself the accident which ensued. There is where your fact-finding ability comes in.

Now, the burden of proving that the plaintiff was contributorily negligent is not on the plaintiff, it is on the defendant. In other words, if the defendant comes in and says, you, plaintiff, were contributorily negligent, then the burden of presenting convincing and credible proof, as I have already defined the burden of proof for you, rests on the defendant.

In other words, it is the defendant who must prove by a fair degree, a fair preponderance of the believable

testimony, that the plaintiff was contributorily negligent. Just as it is the burden of the plaintiff to prove by a fair preponderance of the believable testimony that it was the defendant who was either negligent or whose vessel was unseaworthy.

On the other hand, if you find that the injuries were not due either to negligence and/or unseaworthiness, but were solely the fault of the plaintiff, then of course he cannot recover.

It has been observed, and we should contemplate this in all matters, that hindsight is the cheapest form of wisdom. We can all be very wise after an event of short existence takes place. And so it is not what a sober judgment after the event has taken place might indicate what the proper course should have been. In essence, the question is whether or not this plaintiff exercised the proper care of a reasonably prudent employee at that particular time and under all the circumstances then existing.

Now, unlike law in other cases that you have heard about where even the slightest negligence on the part of the aggreived party excludes recovery, in other words, you have undoubtedly heard that in certain types of cases in certain jurisdictions where a plaintiff contributed even in a slight way to an accident, no matter how small is the

part that he played, even if it was only one-tenth of what caused the accident, and the other nine-tenths was by the person he is suing, he cannot recover a penny. But, that is not the law in this court and in this case. The law here is that if you should find that the plaintiff was contributorily negligent, you figure what the percentage toward the total accident he contributed and how much the defendant contributed.

To give you an example which is not an indication of how I feel at all, not indicating one way or another, if you find the plaintiff contributed to this accident to the extent of one-tenth, one-quarter, one-half, then the law says you deduct the extent of his negligence from what you would have awarded him if he had not contributed to the accident at all. It is as simple as that.

Do you get it, madam? Do you all get it? Now, another point. As a matter of law, a seaman is bound to follow the orders of his superiors on board a vessel. Moreover, a seaman is not contributorily negligent and does not assume any risk of injury in obeying the orders of his superior or in accepting the working conditions and appliances provided for that purpose.

Accordingly, if you find that the plaintiff was assigned the task of operating the tugger winch on his

own, then plaintiff was bound to accept that assignment and did not thereby assume any risk of injury in carrying it out provided, of course, that in carrying out that assignment he proceeded with reasonable care and exercised caution under all the facts and circumstances then existing.

In other words, the law always requires that a person exercise reasonable care under the circumstances in carrying out any task assigned by a superior. Therefore, if you find that the plaintiff failed to exercise reasonable care in carrying out such assigned tasks, then plaintiff was contributorily negligent.

If, on the other hand, you find that the plaintiff in carrying out such assigned tasks did exercise reasonable care under all the circumstances, then the law says that he was not contributorily negligent.

Now, ladies and gentlemen, we come to the issue of damages. If you decide against the defendant on either of the claims of negligence and unseaworthiness, then you come to the issue of damages. The purpose of damages under the law is not to reward a plaintiff, but to properly and fully compensate him to the extent that money can do so for damages actually sustained.

You must be satisfied by a preponderance of the credible evidence that the burden resting on the plaintiff

to prove this issue of damages has been met. So, if after considering all the testimony on this issue of damages you are satisfied that the plaintiff's evidence in terms of quality and credibility is worthy of belief, then he has met the issue of damages and met the burden which the law casts upon him.

Now, what does the law say with regard to damages? The plaintiff urges upon us his claim that this accident happened when he was, I think, twenty years of age. The mortality and work period tables indicate, although you are not bound by them, that he has a life expectancy of somewhere in the neighborhood of forty-six, forty-seven years and a work expectancy of forty-two years.

He contends that despite frequent pain and other serious ailments that he finds frustrating and disabling, he does the best he can to hold on to his present position, a job much lower in the scale with much less pay, little opportunity for advancement and devoid of nautical interest.

He further urges that this accident so disabled him that in effect it cut short his working career to which he had addressed his efforts constantly as he began to rise in that field, and that it converted a fairly vibrant life of activity to a somewhat depressed and listless existence which is likely to continue for a long time to come.

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The law says, and says this clearly and firmly, that one responsible for an injury must respond for all damages which result directly from and as a natural consequence of the wrongful act according to common sense.

Although the damages cannot be remote, contingent or speculative, they need not be immediate. They must, however, be proximately caused by the event and be independent of other intervening causes.

In arriving at the amount of the award you should take into consideration the following factors: Past earnings lost, that is the reasonable value of time necessarily lost up-to-date by plaintiff since the injury because of being unable to pursue his occupation as a result of the injury. The parties, as you know, have agreed that that sum is somewhere in the neighborhood of $11,000. Then you remember there was a maintenance amount of $3,000. And I told you then and I tell you again that that maintenance amount there is no proof if its continuance. I am just telling you, you were told that up-to-date that is the amount that was paid over by the defendant to the plaintiff. That is not by way of an admission of liability or responsibility. The point is toward that $11,000 he got $3,000. But you are not, and I emphasize, not, to conclude that therefore there will be that kind of money coming from the defendant to the plaintiff

in the future. There is no proof on that. You have no right to assume it.

As to future earnings, that is, the plaintiff claims that his injuries will have the effect of causing him to be less able to earn in the future. If you determine that the plaintiff did suffer these injuries and that his future earning capacity will be diminished as the result, he is entitled to an award to compensate him for this future loss of earning power to the extent of the reasonable value of the earnings you determine he will lose in the future.

I know that that is prognostication, I know that this cannot be done with mathematical certainty, but the law recognizes that people like yourselves can strike a fair and equitable balance taking into consideration, based on the evidence before you, the chances that this particular plaintiff has for employment and other factors that your common sense indicates to you should be given weight and consideration in determining the loss of future services.

There is no contention here that he is entitled to stay home. The fact of the matter is that the evidence shows that he returned to work and has been working steadily. The point is, what kind of work can be expected of him in the light of the injuries sustained?

In computing the amount of lost future earnings

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you must consider the likelihood of wage increases. The jury is not to take into consideration any income taxes the plaintiff would have to pay on future lost wages and deduct such taxes from any amount awarded to plaintiff.

Now, plaintiff has a duty to mitigate damages by reasonable efforts to secure employment within his competence to perform, and you must ask yourselves, what is the likelihood of that? To what extent can that be anticipated? The law does not permit him to come back again. He can't come back in a few years from now and make a report to you. This is it, to use the vernacular.

You must make a decision on that point, and make it now. What you say now is what is binding and conclusive, not only for now, but for the future.

So, with respect to his future earnings you may consider his age and reasonable expectancy of working years, his health, his physical ability, his earning power before the accident and now, the type of work he had been doing and had been accustomed to do, as well as his ability to perform other work.

You may also consider the nature and extent of his injuries and their probable duration. You must bear in mind the type of work he was trained for: to carry out important assignments, the execution of which constantly

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demanded his good right and his good left arms.

You may consider the plaintiff's normal working expectancy. He is now twenty-three. Take into consideration the specific evidence concerning the actual state of health of this plaintiff. You must discount any loss of future earnings which you may find in order to ascertain their present value.

In other words, as you project into the future the amount that you believe would be his loss of earnings, you cannot, must not fail to discount what that means when the payment is made now and not over the years at a stipulated period. You understand?

In considering what amount of damages, if any, the plaintiff is entitled to, you should also consider the effect of changes in the cost of living, or the purchasing power of money upon the value of the dollar.

X Now, ladies and gentlemen, more important than anything is another item, the one dealing with pain and suffering, X and that the law says should be a sum which will compensate the plaintiff reasonably for any pain and discomfort suffered by him resulting from his injuries from the date of the accident to the present, and also for such pain and discomfort as he is reasonably certain to suffer in the future from the same cause based upon the evidence

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presented to you and the evaluation of that evidence by you as the ministers of justice.

You must determine to your satisfaction the extent of the injuries, including the extent to which any of the injuries are of a permanent nature. This imposes an additional burden upon you, but I am sure you recognize its importance in your total deliberations. He has, I repeat, the burden of proving the extent of his injuries resulting from the accident.

X It has been a very common observation that there is no precise yardstick which the Court can give you to measure pain and suffering. If one loses a leg or an arm or a hand for a cause, especially a noble cause, compensation for that loss is in the spiritual contentment of recognizing it was something of a holy mission.

It is different when a loss is sustained through fault, and that the law recognizes. X So, you have the right to take into consideration the time that the plaintiff was confined to bed, or the house, or to the hospital, and the effect of his injuries upon the normal pursuits and pleasures of life and the hardships and the inconvenience involved. That is the law.

A Do you believe him when he says he can't hold his baby in his left arm? If you do, is that a matter of in-

difference? Is his earning power the only thing that counts in life? Or is it the ability to hold a baby in your left arm? If it's true, and if you believe it. Is it true that he can't play pool? If you believe it, what is that worth?

You may want to read books, play golf, work in a laboratory, be a teacher. He wants to play pool. Nothing wrong with that; if you believe him to be deprived of that privilege. The law says it is a matter up to you.

Now, there are varying degrees of pain and suffering. The plaintiff contends that the proof warrants your finding that he is now and always will be experiencing substantial periods of pain; that in his case there are few compensatory physical functions upon which he can rely so that life can have its former zest and satisfaction. A

If you find this to be so, and of course you understand this is only if you find it to be so, for instance if you are to find that it will not be permanent or even if permanent it will not interfere with his carrying out tasks which today seem impossible, if you should so conclude, that is an entirely different matter. I go on to say to you, you may award the plaintiff such damages which you regard adequate toward this particular segment dealing with pain and suffering and permanence which is a part of his plea for total damages recognized by law.

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Pain and suffering, **permanency,** inconvenience, embarrassment, all of these are recognized by law as much as loss of wages to date and loss of future wages. You can't substitute your own formula and throw this in the discard. Oh, no. This is the law. But the law states these various segments of damages. It does not say loss of past wages and future wages, period. Oh, no. The law prescribes exactly the elements that I have given you that are a part of the totality of what is meant by damages.

You have heard the medical opinions expressed by the doctors and the ones contained in the hospital records which are in evidence. The opinion of the doctor is evidence given by a person who expresses a judgment based on experience and special knowledge. However, such expert testimony is not binding upon you in any respect, and it is your function to determine as a fact **the nature, extent and permanence of** the injuries and to make an award accordingly.

I don't need to tell you that it is quite evident that on essential points the experts were diametrically opposed. That alone shows you the power given to a jury. Does it mean that a person must show that someone has lied? No. It means that you must be convinced of the point that is advanced. The law knows that there will be experts on both sides and that the fact-finders may have to make a

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choice. But despite what they say you determine, for instance, seaworthiness or unseaworthiness. That is for the jury. Despite what they say about permanency or not permanency of injuries, you, based on what you have seen and heard, determine that issue.

So you see the power of the jury is enormous. And you can see why I spoke to you when you were being selected in the fashion that I did.

On all items of damage you are to be guided by your common sense. Take into account the vicissitudes of life, the hope and despair, the opportunity and frustration, the possible advantages, as well as disadvantages. As with everything else in this case, you are to be guided by what life has taught you, in the experiences you have had. Such an award which should not be fanciful or theoretical, but which represents a practical approach to a practical problem, must bear a reasonable relationship to the nature and extent of the injuries which you find, and all these items of damage then are to be totaled up into one lump sum.

In addition to recovering for out-of-pocket losses, wages, I have told you this already, but he is entitled to a sum of money which will justly and fairly compensate him for his pain, suffering, shock and embarrassment and any loss of enjoyment of life.

X The law says that you cannot restore that enjoyment if you find that it has been lost or that deep satisfaction, if you find that there was and it has been lost, or that satisfying reaction to an enterprise which makes all else seem rosy. You can't bring that back. But a man has a perfect right to have had it and a perfect right to continue to have it.

X If you find that any of the plaintiff's injuries are permanent, you must make such allowance in your verdict as you think the circumstances warrant, taking into consideration the period of time that has elapsed from the date of the injury to the present time, and the period of time that plaintiff can be expected to live. Each one of these separate and distinct items comprising total damages is important and must be so regarded. That, says the law, is only fair.

A word or two about circumstantial evidence. There are, generally speaking, two types of evidence upon which a jury may properly find the truth as to the facts in the case. One is direct evidence, such as testimony of an eyewitness. The other is indirect, or circumstantial evidence. That is proof of a chain of circumstances pointing to the existence or nonexistence of certain facts.

Circumstantial evidence is the proof of facts

from which a fact in issue may reasonably be inferred.

For instance, I see it raining, or, I see you right in front of me, there you are. I see you with my own eyes. That is direct evidence. Suppose when you went out today to lunch it was bright, sunny. You sit here, you don't look outside through the window, and in comes a man, takes a seat and you notice that he is dripping wet. His umbrella is wet, he makes a little puddle almost as he sits down in the seat.

You didn't see the rain, but you have a right to conclude that it has been raining. That is circumstantial evidence, and that is all there is to it. There is nothing complicated about it. It is a deduction that you make, an actual inference that is drawn from the sight of that person, and the rain, and the conclusion of rain that you draw.

So you may draw such inferences as reason and common sense lead you to draw from the facts which you find to have been proven.

No greater degree of certainty is required of circumstantial evidence than of direct evidence. It is not on any different or lower plane than direct evidence. The law simply requires that you find the facts in accordance with the preponderance of all the evidence in the case, whether it is direct or whether it is circumstantial evidence.

I would say, ladies and gentlemen, that the

heaviest burden you have is to judge the witnesses, that is your severe challenge. Therein lie the answers, I would suggest, in large measure.

How did each witness impress you? Not me and not the attorneys. You have, to use the vernacular, been around. You have had various experiences with human beings under all sorts of conditions and circumstances. You have participated in important matters that are meaningful to you and your family. You have dealt with people in the market place. You have dealt with people in all walks of life under different circumstances and conditions. That is what makes a jury so vital and so important.

All of these observations you have had during your lifetime which you can apply in judging the quality of the testimony that was given upon the trial. That is exactly what one of the grestest Jurists of all times had to say, Mr. Justice Oliver Wendell Holmes of the Supreme Court of the United States. "The life of the law is not logic, it is experience."

It is your experience with people in life situations that we call on now. You weren't there when it happened, I wasn't, either. The lawyers weren't there. That is the reason that the law says that the evidence should convince an impartial, objective, fair-minded jury by the tests that

I have laid down for you.

Take into consideration who these witnesses are, their backgrounds. Putting aside the expert witnesses, like Mr. Ash and Mr. Wheeler, Capt. Ash and Capt. Wheeler, and Dr. Mauer and Dr. Lodico, you have only heard from Anderson, Ducey, Capt. De Graff and Mr. Rankin, as I recall it.

Take into consideration how they impressed you. Which one spoke with conviction, with sincerity? Which ones didn't speak that way? Was there a lapse of memory, explainable or not? Were there any absolute falsehoods? Was there carelessness with the truth?

You don't expect one who uses his hands to be as articulate as the one who by training had frequent occasion to do that to express himself.

You must ask yourselves all of these questions as you sum up the impression of any witness who took the stand before you. You do the assessing, and that is up to you all the way down the line.

Consider for example the testimony of the captain. Counsel on both sides have called your attention to various phases of the testimony dealing with his contribution to this trial.

You might also ask yourselves whether his

testimony was guided by him so as to exonerate himself from blame for the accident. You might wish to consider further whether the captain's testimony was induced by his knowledge that the number of men reporting for work that Sunday was insufficient, or whether he committed error by taking the plaintiff's brother off the tugger winch job and putting him to work painting.

All of this is pertinent to your inquiry, whether one man could have done that job alone or whether more than one was required, and the reason why that was not forthcoming.

Of course, you may reject any and all of these suggestions. They may not be sufficiently impressive. Your estimate of his testimony is what counts. I am anxious to have you try out each factual situation for size and see how it fits the truth.

The fact that the plaintiff has a limited vocabulary, even though you should so conclude, does not mean that he might not resort to falsifying. Did he meet with the injury the way he said? Or was it that the vessel, the craft on which he was working, the dredge, lurched? What about that lurching? Let's get to Mr. Rankin in a minute.

X You might consider whether plaintiff has in fact a limited vocabulary and finds difficulty in expressing

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himself. If so that might account for his inability to explain things in detail.

For instance, he testified as to one of the answers he gave during his deposition that he did not know what happened at the time of his accident. He said he gave that answer after many questions on the same issue.

The deposition reveals that in fact he was repeatedly questioned on that score, which was a perfectly proper procedure. Was that particular answer false? Or given impatiently? Or was it due to his inadequacy of expression?

On the other hand, you might consider that quite often articulate people find difficulty in giving important details of an accident happening. Quite frequently they are heard to say, "then all of a sudden my foot, or my arm, and so forth, got caught."

It then becomes the mission of the fact-finder to piece the known facts together, draw therefrom reasonable, fair, normal inferences, and after careful deduction arrive at a conclusion, if that is at all possible, as to just what brought the accident about and the injuries which ensued therefrom.

Finally we suggest you review in your minds the demonstration before you given by plaintiff using the jury

drum and a cord. You may recall that in that demonstration he had his left hand on the cord which represented the cable, then he showed the hand suddenly jerked toward the drum, his hand on the cord throughout.

That demonstration if believed was to my mind the most eloquent piece of testimony as to how the accident took place. But it is your assessment, your evaluation, your impression that controls completely.

What I am saying to you, ladies and gentlemen, is that in providing for a jury the law is accommodating the ends of justice. I have seen too many people who have no practical sense, people over whose eyes you can pull the wool over and over again. It is like taking candy from a baby. Practical sense, common sense. Book learning is not enough by a long shot.

One of the famous authors once said, "What a bloodless substitute for life." That is why you are hailed as ministers of justice, because in the last analysis it is your evaluation of the testimony that is going to do justice in this case.

So all I can beseech you to do with regard to your obligation, among other things, is assess the testimony, all I can do is beseech you to ponder and to reflect with care.

Possible inconsistencies in the testimony of a

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witness, or between different witnesses, may or may not cause the jury to discredit such testimony. In weighing the effect of such discrepancies, consider whether they relate to matters of importance or to unimportant details, or whether the discrepancy results from innocent error or from willful falsehood.

If you find any witness has willfully testified falsely as to any material fact, you may reject all the testimony of such witness, or you may accept such portion or part which commends itself to your belief.

You may disbelieve or reject the uncontradicted testimony of the witness, even though his credibility has not been impeached.

You make your own evaluation as to how the witness impressed you, as to the extent that the conviction of his testimony carried, the manner in which he testified, whether or not the witness would be affected by the verdict.

As with every claim asserted and with every defense interposed, you should bear in mind when considering the motive for testimony, the interest plaintiff has in the outcome of this litigation and gaining thereby; likewise the interest of the defendant in defeating the claim and saving payment. This is not to suggest that either did in fact resort to anything improper in order to accomplish

that goal. I point it out only for your attention, to weigh, demerit or discard as you believe best.

Did the accident happen as plaintiff contends? Concededly he was the only person there at the time the accident occurred. Was it due to a sudden lurching of the dredge, as the witness Rankin testified plaintiff told him a day or two following the accident at the hospital?

Further, was Rankin trying to minimize his own typed material in the captain's accident report which on its face clearly lends support to plaintiff's position?

Going further, and by way of illustration, you might wish to reflect on plaintiff's testimony as to the fish-hook on which he believed his finger got caught. You know I have ruled all of that testimony out in that it was not established, but for the purposes I am about to refer to it you will see that there is this difference:

He testified frankly that he did not see or feel it, and never wavered from that position. If inclined to falsify, especially on a factual issue of importance, he could have insisted that it was actually there.

I refer particularly to portions of plaintiff's testimony, because he is the one asserting the claim and, therefore, has the burden of proof by a fair preponderance of the credible evidence. Ducey's testimony which gave

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considerable support to plaintiff's contentions. I do not recall that cross-examination attempted to establish any motive by Ducey to say what he did or that it was even said during summation for the defense. Ask yourselves whether Ducey had the answer to the contested questions here. Expert witnesses have taken the stand before you. What has the law to say as to an expert witness? You have heard from witnesses who are considered expert in that they have a knowledge, a special knowledge in that particular field to which they have addressed their efforts over the years.

The rules of evidence ordinarily do not permit a witness to testify as to his opinions or conclusions. When we come to an expert witness, the law says that that is an exception. A witness who by education and experience has become an expert in any art, science, profession or calling may be permitted to state his opinion as to a matter in which he is an expert and which is material to the case and may also state the reasons for such opinion.

You should consider such expert opinion received in evidence in this case, and give it such weight as you the jury thinks it deserves.

You should apply the same standards in appraising the quality and credibility of an expert, medical or otherwise, as you do that of any lay witness by judging his

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background, his conduct on the stand, his appearance, his manner of testifying and, in general -- and this is important in the case of all witnesses -- the weight or conviction that his testimony carried with it.

In determining the weight to be given such opinion you should consider the qualifications and the credibility of the expert and the reasons given for his opinion.

You are not bound by such opinion. Give it the weight, if any, to which you deem it entitled.

In resolving any conflict that may exist in the testimony of expert witnesses, you should weigh the opinion of one expert against that of another. In doing this you should consider the qualifications, the credibility of the expert witnesses, as well as the reasons for each opinion and the facts and other matters upon which it was based.

Now, this applies to each witness, experts included. When the witness testified, did he talk with conviction? Did his testimony impress you? Did it come across, so to speak? That is such an important indication, or criterion of truth.

All of us have different ways of spelling out our convictions. Some people quietly, some more dramatically, some more forcefully. It is not the manner or the method that is the test. Did it reach you? Was the testimony given

with conviction?

A further word as to the expert. Consider whether he was objective in his conclusions regardless of who engaged his professional opinion.

A word or two about depositions. They played a rather important part before you. You are not to discount the testimony by deposition for the sole reason that it comes to you in the form of deposition. The law states that a party to a suit may introduce into evidence the deposition of his opponent, or for any purpose at trial even though the party deposed is available to testify at trial or, as here, has in fact testified.

You remember you heard the plaintiff's deposition, and he testified, and you had, on behalf of the defendant, Capt. De Graff and Mr. Rankin. Therefore, you may consider the plaintiff's and defendant's testimony as it came out in the depositions, not only for the purpose of testing the credibility of their testimony during the trial, but also as substantive evidence regarding any factual issues covered in the deposition. It is entitled to the same consideration and the same judgment on your part and takes the same weight as the testimony which they gave here from the stand.

Now, ladies and gentlemen, I am coming to the end. We are going because practical sense, says the higher Court,

and I think it is wonderful, makes it advisable to do so, I am going to send you in a sheet later on which will set out a set of questions that will follow exactly what I have been talking about, and you will indicate to us -- this is roughly speaking -- was the defendant negligent? Yes or no? Was the ship unseaworthy? Yes or no? You don't go to that question of unseaworthiness if you decide against the defendant on the issue of negligence. We understand that.

Then the next question will undoubtedly read, was the plaintiff contributorily negligent? Because that would be an issue that you have to resolve regardless of whether you find the defendant responsible in negligence or for unseaworthiness. Then if you find him guilty of contributory negligence, to what extent? Fifty percent? Twenty-five percent? Seventy-five percent? What percentage?

Then what your verdict is, it in favor of the plaintiff after making the deductions for his contribution to the negligence, if you find there was any contribution. It will give us a guide and it will enable us to have the record record just what you found as to those important issues.

As a matter of fact, it will help you in your own approach to the entire obligation that you have.

Now, to report a verdict for either plaintiff or

for defendant, it must be unanimous. It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement. This is not a jury of one, it is a jury of six. Each of you must decide the case for himself or herself, but you should do so only after consideration of the case with your fellow jurors.

You should not hesitate to change an opinion when convinced it is erroneous. Discuss your opinions dispassionately without regard to sympathy, prejudice or favor for either side, and adopt that conclusion which in your good conscience and under your oath appears to be in accordance with the truth.

If the plaintiff is entitled to a verdict, give him the verdict. You are not doing him any favor when you do that, you are doing what justice demands of you and what he would be entitled to.

If he is not entitled to your verdict, you recognize the defendant with the same fairness and the same sense of obligation.

The case is being submitted to you with the confidence on the part of this Court that the oath of office that you took as jurors to fairly and impartially pass upon the evidence will be faithfully observed. You may have the documents that were marked in evidence, you may have reread,

if you find it necessary, any piece of testimony.

When you have reached a verdict, please inform the United States Marshal, you will then be returned to the jury box to state in open court what your verdict is.

I implore you to present your individual views to one another and to consult with one another and remember that each one of you took the same oath, and that when you feel strongly about something as you would have a right to, and someone else feels strongly about something else, some other position, you must respect it, remembering that that person is equally devoted to the doing of justice as yourself.

So you adopt the factual conclusions that seem proper, if you can do so without violence to your own individual judgment and employ that high degree of genuine courage that you justifiably expect from your public officials. You should not hesitate to change an opinion. Judges frequently do exactly that before arriving at a conclusion.

Finally, ladies and gentlemen, I commend you for the faithful performance of your sworn duty, and that is without fear or favor to any man you are to well and truly try the issues in this case between this plaintiff and this defendant according to the evidence presented to you and under the applicable law as stated to you by the Court. I point out to you with all the emphasis that I can summon

that in your deliberations in the jury room there can be no triumph either for the spirit or the letter of the law in doing justice except in the ascertainment, the declaration and pronouncement of the truth. That really in essence is your mission.

And this final thought I leave with you, and I say it with measured tones: You undoubtedly have had occasion to complain about justice, you have criticized the doing of justice. You may be right, you may be wrong. Plainly putting it, you had a perfect and inalienable right to do all the criticizing you wished. The point I make though is now you yourselves are sitting in the seat of justice. Apply to yourselves your own criticism of justice. What will you do? Will you call them as you see them as they come across the plate? That is the true test of justice, calling them as you see them. I have every confidence that that is exactly what you will do.

If you will be good enough to excuse counsel and the Judge we will be back shortly.

[In the robing room with counsel]

THE COURT: Gentlemen, are there any exceptions or requests by the plaintiff?

MR. DANAHAR: No, sir.

THE COURT: Are there any exceptions or requests

by the defendant?

MR. COHEN: Yes, sir. I have to respectfully except to your entire charge in toto on the grounds that by tone, emphasis and repetition it became a one-sided charge, if I may, and it was virtually tantamount to directing a verdict for substantial amounts in favor of this plaintiff against this defendant.

As one illustration of that, your Honor, when your Honor instructed the jury that they were to evaluate all of the witnesses, you singled out only Capt. De Graff for critical inquiry.

Then just a few minutes after that your Honor says that I did not cross-examine Mr. Ducey to establish any motive on his part to falsify. If your Honor please, your Honor said nothing about Mr. Danahar's failure to cross-examine Capt. De Graff with any purpose on his part that Capt. De Graff falsified.

I may point out to your Honor that Capt. De Graff did testify that when he was away in his cabin Ducey was in charge of the job, and I submit that there was examination of Ducey because he was the man in charge of the job at this time with the captain being in his cabin to exculpate himself from any finger of blame being pointed to him.

Now, I submit that the manner in which your Honor

treated those two witnesses, one a plaintiff's witness and one a defendant's witness, therein is typical of what has happened during the course of this charge.

I further -- may I continue with all the exceptions I have, your Honor?

THE COURT: Yes, surely.

MR. COHEN: Your Honor instructed the jury that if they find that more than one man was needed for the job, then the defendant was negligent. Your Honor, I don't think that is proper unless it be accompanied with a charge which was not given here that even if more than one man was needed for the job the defendant would not be negligent in this case unless that additional man's presence would have had an effect upon this accident's non-occurrence.

Your Honor also charged the jury that both sides concede the danger to life and limb of this operation going on, and your Honor did that at a time when he was talking about more dangerous the operation, the greater the duty. Your Honor, we never conceded that this was anything but a routine, ordinary task, not posing any substantial danger to life or limb. And certainly not presenting any more danger to life or limb than improper performance of virtually anything proposed.

Your Honor also charged the jury that we owed a

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duty to make the area safe of conditions which we knew or should have known of and there was no testimony or proof in this case of any unsafe condition. The whole issue ultimately boiled down to being whether this job required more than one man or not.

I also would except and object to the total, in my judgment, disproportionate amount of time and stress and repetition placed by your Honor in charging the jury on the defendant's duty in negligence to the plaintiff which was out of all proportion to the balance of your Honor's charge, and all the other obligations co-relative obligations and duties that the paties had to each other, and all the other legal aspects that have to encompass a charge in here.

Your Honor, I also object to your charging the jury that even if we were negligent in the slightest degree that is sufficient for a finding of liability. My understanding is that if we were negligent in the slightest degree, and only if that negligence was a substantial factor in bringing about the accident, would a finding of liability be warranted.

Once again, we are touching upon the issue of proximate cause, and I respectfully submit to your Honor that I believe that that issue was not completely charged, or charged well in this sense: Your Honor, I believe as I recall it charged the jury that there must be a proximate

relationship between the accident and the injuries claimed. If your Honor please, I submit this jury should be charged that there must be a proximate relationship, a continuing chain of unbroken events between the act of negligence claimed and the happening of the accident. That is also a part of proximate cause.

Your Honor, also in the course of his charge, made a number of comments to the jury, which I respectfully submit were not properly charges on the law, but were rather comment of the sort that counsel might make in summation, and that your Honor's comments in that fashion were one-sided, all tending to belittle a defendant's witnesses, or to support a factor of the plaintiff's claim.

For example, again, your Honor made some reference to this jury that Capt. De Graff may have been an extraordinary man. I don't believe that that would be proper in a charge, and I have objection to your Honor's saying that.

There was nothing developed in the proof, or, nothing even said by Mr. Danahar in his summation that would indicate that.

Your Honor also charged this jury, and I object to it, that unseaworthiness requires the best standards of the sea. I submit that that is improper, requires only reasonable standards. The test is reasonableness, not per-

fection, as your Honor did say in another context.

Again I ask your Honor for a further charges on proximate cause to the effect that even an unseaworthy condition, or a negligent act by the defendant would not entitle the plaintiff to a recovery unless such condition or act was a proximate cause of the accident.

Your Honor further said to this jury, and I object to it, that Capt. De Graff, your Honor said, testified that tapping of the cable was almost the invariable practice of the crew. That, if your Honor please, was not his testimony at all. His testimony was that he occasionally saw it done, and that when he did see such a practice being indulged in by anybody on those few occasions, he would caution the men not to do it.

Your Honor took fishhooks completely out of the case in granting my motion, earlier today, but now submits to this jury that because the plaintiff did not say that there were fishhooks present he is an honest man and should be believed because it would have been so easy for him to make up such a false claim in that regard.

I don't believe that is proper in a charge. It may have been some sort of a comment counsel might make as argument, but I think when that type of argument comes from the Court, with all due respect, your Honor, I submit it

is prejudicial to the defense in this case.

That pretty much ends it, your Honor.

THE COURT: Have you anything to say?

MR. DANAHAR: No, your Honor.

THE COURT: Let the record show that full opportunity was given to Mr. Cohen to voice his objections, and all I wish to say in response is that his objections are noted and that the main thrust and the various points taken up by me in the course of my charge are word-for-word the language applied by me, in part by other trial Judges, that has been passed on by our Circuit Court. I have had the privilege and the lessening of the burden by resorting to that exact language which our own Court of Appeals has seen fit to rule on first with regard to proximate cause, then with regard to negligence, also the various points that the Court of Appeals has passed on approvingly with regard to unseaworthiness, and so forth throughout the entire charge.

The basic points that I pronounced are word-for-word, in most instances, what I have employed heretofore in similar cases presenting similar problems which went up to our Court of Appeals and were passed on approvingly by the Court.

That is all I wish to say. Gentlemen, let us go out to the jury.

[In open court - jury present]

THE COURT: Ladies and gentlemen, I told you the other day, maybe yesterday, that we would send you to your deliberations. I am sure counsel are prepared to have you go, as I shall instruct, to dinner in custody of the United States Marshal.

Your dinner will be paid for out of the funds of the court. There is not an awful lot for that purpose. I guess the idea is to have you curb your appetite, because you have to come back and enter upon a serious mission. The use of one's head is really blocked severely by over-indulgence in food.

But, anyway, you will be given dinner, and I hope it proves to be sufficient for you and meets with your approval. Then you come back here and enter upon your deliberations.

I would suggest that the alternates be good enough to go along only for protective purposes. I don't know what might in a certain case happen, you never know, just don't get any indigestion any of you. I don't want to use the alternates. I want you all to be in perfect shape. But I do want to thank the alternates at this time, because you may be excused by the marshal if by the time the marshals bring you back from dinner the six of you are ready to enter

upon your deliberations.

In any event, the alternates will leave and not without the Court's sense of appreciation for the diligence and concern that you, along with the rest of the jury have displayed throughout. It has been heartening to me, and I am sure to counsel on both sides.

I told you also yesterday that I was aware that some of you were apprehensive about getting home late. Do not be disturbed on that score, and do not let that interfere with the peace of mind that you should have as you will go about your **important** mission. I have provided for appropriate service to take each one of you home to your very door at the time you have concluded your deliberations.

The Judge and the lawyers will await you and do whatever we can, because now the burden is with you.

Mr. Clerk, will you please proceed.

[Marshals sworn by the Clerk]

THE COURT: Marshals, would you be good enough to take these ladies and gentlemen to the dining place within the next ten or fifteen minutes.

Thank you very much, and bring them back when they have completed their dinner so they can enter upon their deliberations.

Madam Forelady, ladies and gentlemen of the jury,

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I have said this to juries over the years, and I hope I may be spared to continue to say it to more juries in the future, and that is, in the last analysis the justice in this case rides with you.

Thank you, you may enter upon your deliberations.

[Jury excused]

[In open court - jury not present]

THE COURT: Gentlemen, the jury sent in a note here and it reads as follows: The jury would like the following: Three photos used in summation; Mr. Ducey's testimony; Capt. De Graff's deposition; Capt. Ash's testimony; medical reports, accident reports signed by Mr. Rankin.

Now, the three photos used in summation, get them right together right now. That is easy. They were in evidence, and I had you refer to the exhibit numbers when you used them. Get them together right this minute so that we will know you have got that much accomplished.

Mr. Cohen and Mr. Danahar, will you please let the record show what numbers they are and that you have agreed on them.

MR. COHEN: They are photographs Exhibits A-2, 1 and 2-F.

THE COURT: Then Mr. Danahar, what is yours?

MR. DANAHAR: 2-B.

THE COURT: All right. Now, that is that.

Now, just give that to the Clerk, please, hand those to the Clerk, and when we get through he will turn those over to the marshal.

Now, Mr. Ducey's testimony, all we can do is say to them, ladies and gentlemen, we will have it read to you. Am I correct, Mr. Cohen?

MR. COHEN: Yes, sir.

THE COURT: Any portion of it that they wish.

MR. COHEN: Yes, sir.

THE COURT: All right. Capt. De Graff's deposition. Now, gentlemen, what do you say on that? I think that for practical purposes, even though it was not marked as an exhibit, a great deal of it was used and I would suggest that you just turn over the deposition to them rather than have them have it all read to them.

Now, what do you think, Mr. Danahar?

MR. DANAHAR: Your Honor, there was only a very small portion of Capt. De Graff's deposition read, and I don't think the whole thing should be turned over to them at all.

THE COURT: All right. I can't make you consent to it, because it is not an exhibit and we will just tell them that that can be read to them.

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MR. DANAHAR: But, your Honor, the whole deposition can't be read because the whole deposition wasn't read in evidence.

THE COURT: There is your answer. Capt. Ash's testimony, we will have as much read of that as possible.

Medical reports, will you get those together, gentlemen, please, right now so there will be no question about that? They can at least have that much.

MR. DANAHAR: Well, there were no medical reports, there are medical records.

THE COURT: You know, they say medical reports. I will be glad to ask them. I will tell you, I think the best thing to do would be to get them in here and I can explain to them why we can't give them some of the stuff that they are asking for in the form that they are asking for it.

Will you bring them in, please, Mr. Marshal? And will you get the accident report signed by Mr. Rankin, that means the captain's report. It wasn't signed.

(Jury enters the courtroom)

THE COURT: I have your note, ladies and gentlemen, and it requires a word of explanation. The three photos used in summation, that is easy enough. They were marked as exhibits.

The accident reports signed, you say, by Mr. Raskin, you mean Mr. Rankin, but it was not signed by him, it was the captain's report.

Is that what you want, Madam Forelady?

THE FORELADY: Yes.

THE COURT: Thank you.

Now, the medical reports. What do you mean by medical reports? Do you mean the X-rays, or do you mean the medical material that was introduced into evidence other than X-rays, or do you want both?

THE FORELADY: I believe they want both.

THE COURT: Both? All right. All the medical reports and X-rays and anything of that nature that was introduced as an exhibit. Is that what you mean?

THE FORELADY: Yes, sir.

THE COURT: Fine.

Now, Mr. Ducey's testimony, that has not been transcribed. We can let you hear any portion of it. Now, what happens is the jury says through the forelady, we would like to have read what Mr. Ducey had to say on such and such a point. Then the court reporter goes to his notes and he figures out the portion of Mr. Ducey's testimony that deals with the point or points that you wish.

You understand?

THE FORELADY: Yes.

THE COURT: Or, if you want the whole testimony read back, you can have it. If you want his entire testimony, it wasn't long as I remember anyway, but that is for you to decide. But you see, you are under the impression, at least I get that notion, that you think that all you have got to do is ask for testimony and then it is already transcribed and all you have got to do is say, here it is, read it. No, it can't be done like that. You have to indicate what testimony you want, and then it is read to you.

Is that clear?

THE FORELADY: Yes.

THE COURT: If you want all of Mr. Ducey's testimony read or any portion read we will be glad to give it provided you tell us what it is you want.

Capt. De Graff's deposition, that was read into the record, so you could have any part of it read. All the deposition was not used, only a certain portion was used. We will be glad to read you any part or all of Capt. De Graff's testimony, whether by way of deposition or not.

You understand?

THE FORELADY: Yes.

THE COURT: Do I make myself clear? All right.

Capt. Ash's testimony, you want the whole thing,

or what portions of it do you want? We will be glad to give it to you, but it can't be done the way you figure, that it is sent in to you and you read it. It has got to be read to you in the presence of the Judge, in the presence of the lawyers, by the court reporter in the courtroom. So, be good enough, we are going to send in the three photos, we will send in the accident report of the captain, we will give you the medical reports which you have emphasized mean everything of all the exhibits relating to hospitals and the medical testimony, and then you have to tell me, in the meantime you go in there and decide, ladies and gentlemen, how much of Mr. Ducey's testimony you want, how much of Mr. De Graff's testimony by way of deposition or otherwise, how much of Capt. Ash's testimony you want.

Go and talk about it. In the meantime we will get you these other exhibits, and I await your note. The sooner you write that note, the sooner the court reporter can start digging into his minutes.

Are those the minutes, Mr. Reporter?

THE COURT REPORTER: Yes, sir.

THE COURT: Here it is. He has to go in that to get it. He will be glad to do it.

MR. DANAHAR: Your Honor, there are four photographs that were used in summation.

THE COURT: Oh, yes. There happened to be four, and we are sending the whole four.

MR. DAMAHAR: Between the two of us.

THE COURT: All right. Mr. Marshal, will you take the four photographs, and will you let us have the captain's reports marked in evidence? What is the exhibit number? Mr. Cohen, have you got the exhibit number of the captain's report?

THE CLERK: No.3, your Honor. Plaintiff's Exhibit 3.

THE COURT: Thank you very much.

Now, the medical reports, will you gather those right now, gentlemen in my presence, and you know what they mean by that, they want all the exhibits relating to the medical testimony. Whatever was marked in evidence.

[Jury leaves to continue deliberation]

THE COURT: Do you have it?

MR. COHEN: Yes, sir.

THE COURT: Will you enumerate for the record what those numbers are, what exhibit numbers they are, Mr. Clerk.

THE CLERK: Yes, sir.

THE COURT: Give it in toto, please.

THE CLERK: 5, 6, 7, 8 and 10, your Honor.

THE COURT: All right. And Mr. Cohen, that is

correct, is it?

MR. COHEN: Yes, sir.

THE COURT: Mr. Danahar, that is correct, is it?

MR. DANAHAR: Yes, your Honor.

THE COURT: All right, Mr. Clerk, turn it over to the marshal.

Thank you, gentlemen.

Mr. Cohen, I turn over to you Defendant's Exhibit D marked for Identification which is the original of the statement by Joseph, it looks like G. Rankin, and that is the same instrument that was marked Exhibit 2, I think, for identification in the course of his deposition.

MR. COHEN: Yes, sir. Thank you, your Honor.

THE COURT: Thank you, sir [handing].

[Recess]

[In open court - jury not present]

THE COURT: Mr. Clerk, the note that I read about ten minutes ago with regard to the requests of the jury, will you mark that as Court's Exhibit No.1.

THE CLERK: That is Court's Exhibit No.2, your Honor.

xx [Court's Exhibit No. received in Evidence]

THE COURT: Now will you mark this one just received from the jury as Court's Exhibit No.3. Will you mark it here, sir.

xx

[Court's Exhibit No.3 received in Evidence]

THE COURT: Now gentlemen, Court's Exhibit No.3 reads as follows: The jury would like to have read: In Mr. Ducey's testimony, questions and answers relating to the number of men usually engaged in the work that was being done at the time of Mr. Anderson's accident.

In Capt. De Graff's testimony, questions and answers about how many men were usually involved in doing the job that was being done at the time of Mr. Anderson's accident.

It seems to me, gentlemen, that they are asking for the same material with regard to those two witnesses, does it not appear so to you, Mr. Danahar?

MR. DANAHAR: Yes it does, your Honor.

THE COURT: And to you, Mr. Cohen?

MR. COHEN: Yes, it does indeed, sir.

THE COURT: You understand, Mr. Court Reporter, it is what they had to say with regard to the number of men required to do on other occasions the same job that Anderson was doing on this particular occasion. It is not just the number of men that was required at the time that Mr. Anderson was doing the job, it is what they had to say with regard to the number of men usually required to do the job that Mr. Anderson was doing at the time of his accident.

Will you dig it out for us right away, please, and let me know when you are ready.

The court reporter points out that in Court's Exhibit No.3 there is nothing said about Capt. Ash, and my answer is they had full opportunity to ask, they didn't ask. We will give them what they ask and nothing more.

[Recess]

THE COURT: Mr. Court Reporter, put this on the record. It has been more than a half hour. What is going on here? I asked you to pick out certain portions that the jury wanted. You don't have to consult with anybody, you have to report to the Court. I understand you have been reading it to the lawyers and they have been fighting among themselves as to what goes in and what doesn't go in. You have to account to me, not to them.

What has been going on, Mr. Danahar?

MR. DANAHAR: Your Honor, the reporter has been reading the entire deposition. He read certain pages, and I thought that those pages had covered what the jury's question asked for, but Mr. Cohen thought that the whole thing should be read further, and that's what we have been doing. But I thought the first few pages that he read were sufficient to answer what the jury had asked for.

THE COURT: He has got to read everything, every-

thing that is in those minutes that deal with the point that the jury wants answered.

MR. DANAHAR: That's what I say, and I thought that the first few questions just dealt with that subject matter.

THE COURT: Come on, Mr. Cohen, would you read to me what you yourself recognize as the testimony of these two people dealing with that point? I don't see why you had any difficulty with that.

MR. COHEN: You see, Mr. Danahar stopped reading and then I read from where he stopped, and I think we have now concluded the reading and I think it is possible, I have been taking notes, your Honor, and I have the pages marked down on which testimony from this deposition relating to the area inquired of by the jury appears. Your Honor, it appears on pages, if I may, sir --

THE COURT: Can you find it by just being given a page number from a deposition?

MR. COHEN: The reporter's suggestion, sir, was that if he read the minutes to us we could check off the questions.

THE COURT: Come along, you read it to me and we just put on the record that I directed you read the whole thing to me, that is all I can do in the light of the upset

here where we are getting nowhere and it is now 9:25. That jury was entitled to have this given to them a long time ago, now please read this to me. Go on, will you please, sir.

[The record was read]

[Jury enters the courtroom]

THE COURT: You sent us a note, "The jury would like to have read in Mr. Ducey's testimony questions and answers relating to the number of men usually engaged in the work that was being done at the time of Mr. Anderson's accident. In Capt. De Graff's testimony, questions and answers about how many men were usually involved in doing the job that was being done at the time of Mr. Anderson's accident."

Now, that took us some time. Remember, there is an enormous amount, so we want you to know we didn't keep you waiting without working. The lawyers have been working on this, the court reporter has been under nervous strain to be able to get every word that had anything to do with this, I had to get in on some of it, and so please forgive us if it took a long time, but it is hard to get it. That should not discourage you from asking for anything you want. I am just trying to explain why you didn't hear from us earlier.

All right, Mr. Court Reporter, now you take over. You are going to read the portions of Capt. De Graff's

testimony dealing with the question which the jury asked.

[The record was read]

THE COURT: All right now, that completes the testimony on De Graff, both in his deposition and what he said before you. Now you come to Mr. Ducey's testimony.

[The record was read]

THE COURT: That completes it. Very well. Ladies and gentlemen, you may -- Yes, sir?

MR. COHEN: If your Honor please, I don't believe we read to the jury the live testimony given by Capt. De Graff on that subject. All we have read so far from him was his deposition testimony.

THE COURT: Sir, we spent pretty near an hour before the jury came in and you were asked, both sides were asked whether we were ready, or words in substance, now, was there anything else, you had a deposition you wanted read portions from, and Mr. Danahar did, and there was nothing said by either one of you to anything else, that there was anything else to be called to the attention of the jury from either De Graff or Ducey.

Ladies and gentlemen, please continue with your deliberations.

[Jury retires to continue deliberations]

THE COURT: Gentlemen, my Law Clerk tells me that

he handed you a copy of what I propose we send in to the jury. Have you got it, yes or no? Have you got it, Mr. Danahar?

MR. DANAHAR: Yes, your Honor.

THE COURT: Have you, Mr. Cohen?

MR. COHEN: Yes, sir.

THE COURT: Very well. I suggest that we strike out "A" under item 2 because the whole issue of negligence or unseaworthiness deals with insufficient help, and unless there is any objection that is what I am going to suggest we do, we strike it and let the rest of it go in.

Does that sound satisfactory to you, Mr. Danahar?

MR. DANAHAR: Your Honor, I am sorry but I am not sure that I understand what you mean. You say under "A" of No.2?

THE COURT: Yes, sir. You have got 2 there, don't you see, insufficient help?

MR. DANAHAR: Yes, sir.

THE COURT: I say that's not necessary because that's the only basis for the negligence, as well as for unseaworthiness, you see. There is no sense in putting it in one place and not the other. So I say strike out insufficient help because that's the only ground for negligence and the only ground for unseaworthiness.

Now, with that out does that sound agreeable to you, that whole sheet, Mr. Danahar, please?

MR. DANAHAR: Up to 5, your Honor. I am just reading 5 now. Verdict for plaintiff -- defendant -- how will they answer that?

THE COURT: Well, they have got to put a circle. Don't you see the words up there, "Please circle your answers"?

MR. DANAHAR: All right, I see it.

THE COURT: What do you say, sir?

MR. DANAHAR: Yes, sir, this is satisfactory.

THE COURT: What do you say, Mr. Cohen?

MR. COHEN: I would ask that there be some instruction that if they find contributory negligence they should make the deduction before they answer 5-A.

THE COURT: No, I instructed them very clearly that they should deduct if there is any contributory negligence the amount of contributory negligence from the total that they would have brought in if there was no contributory negligence. I think that is very clear, Mr. Cohen. In goes the statement, a copy of which counsel have, and will you be good enough, Mr. Clerk, to mark that as a Court's exhibit that is going in to the jury.

THE CLERK: Yes, sir.

xx [Court Exhibit No.4 received in Evidence]

THE COURT: Give that to the marshal.

Mr. Court Reporter, I would like to have the record show that under great stress for almost an hour and a quarter you had to dig out that testimony that was finally read. I want you to know that while we were all breathing down your back, especially the Judge, you did a yeoman job to get it out, and we all appreciate it.

Will you be good enough to come to the robing room with counsel, Mr. Court Reporter. Just counsel and the court reporter.

[In the robing room]

THE COURT: Gentlemen, last Thursday the record will show I stated that I would take Exhibit D for identification with me to give it thought and study in order to determine whether it should be received in evidence, and as I recall it Mr. Cohen said, is your Honor taking Exhibit D marked for identification, referring to the original written statement of Mr. Rankin, and I said, yes.

The court recessed last Thursday around 6:00 o'clock. I went up to my chambers in order to talk to my Law Clerk with regard to that point -- [Clerk enters the robing room]

THE COURT: These are notes dealing with having the family called, permission to call members of the

family.

By all means, Mr. Clerk, would you give it to the marshal. Thank you.

To continue, I made a search for Exhibit D marked for identification and could not find it.

Will you please state on the record, Mr. Danahar, how it came to be in your possession?

MR. DANAHAR: Your Honor, I don't even know that it was in my possession, to be honest with you. You mean since last Thursday?

THE COURT: Do you know what statement I am talking about?

MR. DANAHAR: Yes, you are talking about Mr. Rankin's statement?

THE COURT: Yes. Didn't you find it in your possession after you left here, and didn't you talk with Mr. Cohen and turn it over to Mr. Cohen?

MR. DANAHAR: Your Honor, to be honest with you I am trying to think about this, and I -- can I ask Mr. Cohen if he has some information on this to try and refresh my recollection?

THE COURT: Certainly.

MR. DANAHAR: What was this --

MR. COHEN: As we were going up to Dr. Lodico's

together in the car following Thursday's session you were going through your papers and various exhibits, and you pulled out --

MR. DANAHR: In the cab?

MR. COHEN: Yes, sir. And you said, I have this, and this looks like your exhibit, and you gave it to me. The following morning, your Honor, I received a call from one of your Law Clerks making inquiry as to where that exhibit was, and I explained to them that I had it and I brought it right over to court then.

THE COURT: Now, what do you say, Mr. Danahar?

MR. DANAHAR: Well, your Honor, I have absolutely no recollection of going through my bag while in the taxicab, you know, and coming across an exhibit.

THE COURT: Well, if you didn't find it in the taxicab, did you come across it anywhere else?

MR. DANAHAR: I think now that he refreshes my memory, I think after we were up at the doctor's office I opened my bag so that I could take the medical records out so the doctor could see it, and I think -- and I swear I'm not sure of this, but perhaps maybe at that point I did give it, this exhibit, to Mr. Cohen.

THE COURT: Well, didn't you know --

MR. DANAHAR: Now, to answer your Honor's first

question, how it came into my possession, if it was in my possession I don't know, maybe it was on my table when we adjourned that day and I picked up all the papers and put it in my bag. That's the only --

THE COURT: But it was in the Court's possession. How did it come to you? I had retained it. How did you get it from me? How did you take it from the desk?

MR. DANAHAR: Oh, no, no, sir, your Honor. I did not take that exhibit from your Honor's desk or from any other part of the courtroom. If I took it at all it must have been on my table, and when I picked up all my papers it was put into my bag, but I did not take that from your possession, your Honor. If that is what you are suggesting.

THE COURT: Well, when you found the document, whether it was in the cab or whether it was in the doctor's office, you did turn it over to Mr. Cohen, you remember that, don't you?

MR. DANAHAR: Your Honor, I don't clearly remember that now and I am being sincere.

THE COURT: Well, you had better be because I think this is a very serious business. That is the reason I have called you both in here. I think it is extremely serious, and I want you to be given your chance to tell me on the record what you know about it.

Now, this was a document that I was to keep to study, and I was to make a ruling the next time the case resumed. The record shows that. The next thing I learned is that my Clerk called Mr. Cohen the next morning and found out from Mr. Cohen that he had it in his possession, whereupon he says he came down with it.

Now, all I am asking you is, did it not occur to you, either you or Mr. Cohen, when you came upon it at Dr. Lodico's, or at the time that you went there, did it not occur to you that that was the very document that I was going to retain and study in order to pass on your objection to its reception into evidence?

MR. DANAHAR: Well, it did not occur to me, your Honor, and, as I say, I do not have a clear recollection -- I do have a very clear recollection that I did not go through my bag while in the taxicab and pull anything out of my bag and give it to Mr. Cohen. That I have a positive recollection of.

Now, as I say, when I got to the doctor's office I did open my bag for the purpose of getting out the medical records, and if Mr. Cohen says it was at that point that I handed this over to him and said, this is your property, or whatever it was, if he says I did that I will not deny it. But I absolutely have no clear recollection of that, your

Honor. And I did not take that exhibit from your Honor's possession.

If it did end up in my bag it was purely by accident that in leaving at that late hour I picked up whatever papers were on my desk and put them in the bag. There was no intention whatsoever to do anything underhanded, or to prevent your Honor from reviewing this exhibit. If that is what is being suggested.

THE COURT: Mr. Cohen, do you know about what time it was last Thursday that you got Exhibit D marked for identification?

MR. COHEN: Between 6:00 and 6:15 or 6:20 p.m.

THE COURT: Did you say anything about the fact that I had undertaken to retain it and study it?

MR. COHEN: I did not say anything except, how did you get this? And that was the end of that discussion.

THE COURT: What did Mr. Danahar say?

MR. COHEN: He had no answer. He was going through the photographs in his file. This was in the cab, your Honor. He was going through the photographs getting those together and this seemed to be amongst them and he turned to me and said, this seems to be your exhibit marked for identification.

THE COURT: But didn't you say to him then, this

was what the Judge was going to study?

MR. COHEN: I did not. I said to him, how did you get it, because I had in mind that you had -- when I last saw it your Honor had it in this room on this desk.

THE COURT: Precisely. In the robing room.

MR. COHEN: In the robing room, that's when I had last seen it.

THE COURT: All right. Now, did you not say to Mr. Danahar anything about the fact that this was the exhibit that the Judge was to study?

MR. COHEN: No. I assumed that it must have been sent outside, your Honor, because --

THE COURT: Well, didn't it occur to you that it should not be in your possession, or in his possession, that it was supposed to be in my possession?

MR. COHEN: It did. That's why I said to him, how did you get it? Because I had last seen it on this desk in the robing room.

THE COURT: But you never did anything about it, did you?

MR. COHEN: No, sir.

THE COURT: Until my Law Clerk called you the next morning.

MR. COHEN: That is correct, sir.

THE COURT: We regret to have to note that this is typical of the careless, incomplete and indifferent manner which characterizes a considerable amount of counsels' activity in this case. From their own statements we have it that after discovering last Thursday evening that the Rankin written statement, a proposed exhibit, had been taken from my desk in the robing room, neither attorney even thought to make contact with the Judge who toward the close of Thursday's very late afternoon trial session had taken it, as counsel well knew, and the trial record reveals, for study in order to make a ruling when the trial resumed.

Nor did counsel even attempt to contact court personnel. If either attorney had been fundamentally considerate we would have been spared hours of searching after discovering its apparent loss at 6:00 p.m. We would have been spared an enormous amount of perturbation which caused Judge and staff considerable apprehension and anxiety throughout the long evening.

I sent my Law Clerks down into this robing room and into the courtroom after the court personnel had left for the day, and they went through every inch of the courtroom and the robing room examining the wastepaper baskets, examining everything in sight in order to be able to report to me as to whether they found anything.

They retraced my steps from the robing room to chambers, including the twenty-second floor where I get off in order to take the regular elevator to the twenty-ninth floor since the Judge's elevator only goes to the twenty-eighth. They couldn't find anything there.

I spent a miserable evening Thursday evening denouncing my own carelessness, taking myself to task until I was almost exhausted with worry because I had an important document to the litigants and I felt sure that there was no photocopy in existence.

Based on what they had done here since we began this trial I was positive almost that there was no copy of it in existence. I felt its loss might well have caused irreparable harm to the litigants. We were made to feel disconsolate because of what we then felt was our own irresponsibility.

Suffice it to say we are amazed and disheartened by counsels' thoughtless behavior. Let the record show that all this has been taking place in the robing room and as on each occasion heretofore with neither plaintiff nor representative of defendant present.

That is all.

[In open court - jury present]

THE COURT: It is now 11:25 p.m., ladies and

gentlemen, and I want to say, and I am sure counsel join me in this, that the spirit which you have shown and the deep understanding encourages us that justice does not come easy. Anything worthwhile in life does not come easy. Giving birth to a child, awaiting with grace the exact moment of death, and the doing of justice, all of it is difficult because they are worthwhile achieving. And so, we thank you for sticking this out.

The car is downstairs, it will take you all home. The marshal will see that you get into the car, each one of you will be taken to your homes. Tomorrow you will return here at 10:30 to resume your deliberations. I cannot sympathize with you, because you knew that that is what justice entails. I start a criminal trial tomorrow at 10:00 o'clock. The jury in that case will be ready tomorrow morning at 10:00, I am due here at 10:00. I will be here at 10:00.

On Thursday I have a sanity hearing, someone has been languishing in jail for months, and is being brought from across the nation with his lawyer, witnesses. They are entitled to their day in court, too, and they will be taken care of as long as everybody does his share, and you are doing yours. We are very appreciative.

Ten-thirty tomorrow morning to resume your

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deliberations. Will you adjourn court until tomorrow morning, please, Mr. Clerk, at 10:00 o'clock and at 10:30 for this case.

[Court adjourned as above noted]

[Time noted: 11:30 p.m.]

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Michael T. Anderson 958

-vs- 71 Civ. 2910

Great Lakes Dredge & Dock Company

New York, New York
February 20, 1974--10:50 a.m.

THE COURT: This is the case of Anderson against Great Lakes, and let the record show that the attorneys are here on both sides and that the jury is seated.

I want to say first, ladies and gentlemen, that I appreciate your being on time this morning. You left here not very far from midnight and I hope you all got home safely under the provisions that were available.

The point however that I am greatly concerned with, as you go on with your deliberations, is to remind you not only of your oath and your obligation and the importance of your mission, but to have you remember as you take up your heavy burden that it is the law that wherever possible a jury should agree, should come to an agreement. Not, however, if that means doing violence to the independent judgment of any one of you.

I urge you to speak with one another frankly and openly and discuss the reasons for your thinking. Be candid, and bear in mind a few observations that the law believes

might be helpful to you at this juncture. You have deliberated already for several hours. I want to make it perfectly clear that what I am about to say is not with a view to coercing you into reaching a verdict, or to persuade those jurors who after thorough consideration, deliberation and argument, have reached a conclusion to change that conclusion.

This case before you is important, as is every case wherein justice is to be applied. Just like every case in surgery, as I have repeatedly pointed out to you is important.

The essential factual issues in the case were, after all, simple. You were not asked to determine whether an accident took place, because that sometimes is the function of jurors in many cases of this kind, where there is a contest that an accident took place altogether. You don't have that issue. It is conceded that it took place. So you have been relieved of an enormous burden.

The issues remaining are important and you have got to dissect them and you have got to contemplate on every bit and piece. But I must point out to you that, as with every trial, this trial too has been expensive to both sides. The fact issues have been sharply delineated. If you should fail to agree on a verdict the case is left open and undecided, and the case starts all over again the way it did

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when you were sworn to serve in this case. It will not have advanced one inch.

Like all cases, it must be disposed of sometime. There appears absolutely no reason to believe that another trial would not be equally expensive, nor does there appear any reason to believe that the case can be tried again more expertly or more exhaustively than it has been on either side.

Any future jury must be selected in the same manner and from the same sources as you have been chosen. So there appears no reason to believe that the case would ever be submitted to jurors more intelligent, more impartial or more competent to decide it, or that more or clearer evidence could be produced on behalf of either side.

While undoubtedly the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room. Judges of the Supreme Court of the United States do that. I have changed my opinion over and over again in my judicial life when I felt convinced that an argument advanced really did have much more weight than I thought of at the beginning.

The law is not satisfied by stubbornness that is unreasonable and unfounded. The very object of the jury system is to secure unanimity by a comparison of views and

by arguments among the jurors themselves.

It is perfectly normal for juros to have differences, just as it is normal for Judges to have differences. Frequently jurors after extended discussion may find that a point of view which originally represented a fair and considered judgment might well yield, upon the basis of argument, further discussion, and upon a further review of the facts and the evidence.

Frequently further consideration may indicate that a change of original attitude is fully justified upon the law and upon the facts.

It cannot be that each juror should go to the jury room witha blind determination that the verdict shall represent his or her opinion of the case at that moment, or that he or she should close their ears to the argument of others who are equally honest, equally intelligent and who bear the same responsibility, serve under the same sanction, have taken the same oath and have heard the same evidence with, we may assume, the same attention, and an equal desire to arrive at the truth.

Remember at all times that no juror is expected to yield a conscientious conviction he or she may have as to the weight or effect of evidence. But remember also that after full deliberation and consideration of all the

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evidence it is your duty to agree upon a verdict if you can do so without violating your individual judgment and your conscience.

Consequently I will ask you ladies and gentlemen for whom I have great respect and to whom I have already expressed the thanks of the Court and of counsel for your diligence, for your caring, for your deep concern, I ask you to continue your deliberations and carefully reexamine and reconsider all the evidence bearing upon the questions before you.

Thank you, Madam Forelady, thank you, ladies and gentlemen of the jury.

Marshal, will you take them please to the jury room.

If counsel have any comments, will you make them now so that that will be complete?

Have you anything to say, Mr. Danahar?

MR. DANAHAR: No, sir.

THE COURT: Mr. Cohen?

MR. COHEN: No, sir.

THE COURT: Thank you.

[Jury leaves the courtroom]

[In open court - jury present]

THE COURT: Will you forgive me? I was unable to

take care of what you wanted because I had the court reporter tied up in the selection of a jury in the other case, but by the time you get back from lunch, and you are going to be taken by the marshals, that material will be all ready for you. I will have the portion of the charge ready that you want read. It is going to be as simple as ABC. So you come back here, if you don't mind, at a quarter of 2:00, from your luncheon.

Is the marshal here? Marshal, will you take these ladies and gentlemen to lunch, bring them back at a quarter of 2:00 and we will give them the charge, the portion of the charge that they wish and the testimony read that they wish.

Thank you, and I am sorry, but I just couldn't work it out any other way.

All right, ladies and gentlemen. Have a good lunch.

[Jury leaves the courtroom]

THE COURT: Now, counsel, let me tell you what it is that the jury wants. Number one, they want Capt.Ash's testimony read, all but his qualifications, and here are the words, "The jury would like to hear Capt. Ash's testimony following," in other words, excluding the captain's qualifications."

So that is clear as a bell. They don't want his

qualifications, but all the rest of it they want on direct and cross, whatever that means, too.

Now, they have another part of the note, "The jury would like to hear that part of the Judge's charge to the jury that deals with the negligence and contributory negligence." I shall give them what I read to them yesterday on both those points.

Very well. Please be here promptly at 1:45 p.m. Thank you, gentlemen.

[Luncheon recess]

[In open court - jury present]

THE COURT: Sorry to keep you waiting, ladies and gentlemen, but I got caught in the elevator. Terrible.

One of your notes which we are going to have marked as a Court's exhibit reads, "The jury would like to hear Capt. Ash's testimony following [in other words excluding] the captain's qualifications," and that has been acted on because the court reporter has spent time digging it out. He has got it.

Please proceed and read it in a clear voice.

[Testimony read]

THE COURT: Marshal, I am going to charge the jury on a certain phase of the total charge, so will you see that the door is locked. I don't want any interruptions.

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It will only take me about ten minutes, but I don't want to have any disturbance.

Ladies and gentlemen of the jury, you asked that you would like to hear that part of the charge which deals with negligence and contributory negligence. Let me first take it up in reverse order.

First contributory negligence, what does that amount to, what does it really mean? I am going to expand on it, but in essence it means, to give you a very simple example, two cars, there is a collision on a highway right here in Manhattan, and the question is, who was at fault.

Well, after there is an examination made by those who are charged with determining the facts, it is found that the defendant in that particular case was negligent, but that the plaintiff was also negligent. It wasn't due to, the accident, entirely to the negligence of the defendant. The plaintiff contributed to that negligence.

In some jurisdictions, I think right across the street in the State Court, if there is any contributory negligence by the plaintiff, no matter how small is the percentage of the contribution to that total negligence, he is out. It is a pretty tough rule, but that is the law.

Not so here, so what goes on across the street has nothing at all to do with you. You have to ask your-

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selves, was the defendant negligent? Was the plaintiff also negligent? If so, how much of negligence of the total negligence did the defendant contribute, and how much the plaintiff to that total negligence?

Take a unit of $1,000. If the defendant, a defendant, is entirely responsible, then the plaintiff gets, let us say by way of damages, a number of units, thousand dollar units. But, suppose the plaintiff contributed ten percent to that total negligence and the defendant ninety percent, what do you do? You just take off ten percent of the thousand dollars. He doesn't get the thousand dollars, he gets a thousand dollars less ten percent because he contributed ten percent of the total negligence that caused the accident.

Now, that is rather awkward, and here is the language of the law. The defendant takes the position that the plaintiff brought on his own injuries and, of course, if the plaintiff did so and he was solely responsible, that means no responsibility by the defendant, then he cannot recover on his claim based on defendant's negligence or unseaworthiness.

The defendant goes further and says that even if you do not find that the plaintiff was responsible entirely for the injuries that ensued you should take into consider-

ation that the plaintiff was contributorily negligent.

In other words, the defendant says, look to the entire evidence and see whether or not the plaintiff himself was contributorily negligent, and that is the law, that is what you are supposed to do.

Now, what is the law on contributory negligence in a case such as this? It is the failure on the part of an injured person to exercise reasonable care for his own safety which, cooperating in some degree with the fault of another, meaning the defendant, helped in bringing about the injury.

Plaintiff in carrying out his assignment in the cab on the day of his accident had a duty to act with ordinary and reasonable care to take reasonable precautions for his own safety and to avoid unnecessary danger and act with that degree of reasonable and prudent care that the operation under way called for.

In determining whether the plaintiff was contributorily negligent, you must consider that just as the defendant is required to use reasonable care to avoid injuring him, plaintiff is required, as his duty and as his obligation to the defendant, to use reasonable care and avoid anything that will injure himself.

Likewise, just as the standard which the law

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demands of the ship owner is not perfection but reasonable fitness and safety, so the law does not demand perfection of the worker. Just reasonable care, reasonable precaution and reasonable competence.

So, if you find that the ship owner was negligent, or the vessel unseaworthy, you must then determine whether or not plaintiff himself failed to exercise that degree of care that a reasonably prudent man would have used under the same circumstances.

Accordingly, should you find that the plaintiff's injuries resulted in part or in whole from his own improper use of the ship's equipment, then to that extent and only to that extent the plaintiff would not be entitled to complete recovery.

In other words, if the defendant did anything that was negligent and the plaintiff did something too, certainly the plaintiff is not entitled to complete recovery, and if the defendant was not negligent and the plaintiff was negligent and didn't do that which a cautious man should have done, he can't recover. He just brought the whole thing on himself without the defendant having done anything that was wrong.

But we are not talking about the defendant not doing anything wrong when you come to contributory negligence,

because you have first got to find that the defendant was negligent. You don't take up the issue of contributory negligence before you find out whether or not the defendant was negligent.

MR. DAMAR: Plaintiff, your Honor.

THE COURT: I mean the plaintiff. Stop interrupting. Let's go back.

You go, as I told you repeatedly, to negligence and you ask yourselves, was the defendant negligent? You don't go and ask, was the plaintiff contributorily negligent, first before deciding whether the defendant was negligent.

You understand that? Let me go slower, possibly I am getting impatient.

You ask yourselves, does the evidence show that the defendant within the definition that I gave you of negligence was negligent. If you find, yes, then you ask yourselves, did the plaintiff himself contribute to that negligence and cause that accident?

Is that coming through now? Do you get it, sir? You act as though you had it all along. I want to be mighty sure you get that.

You don't take up whether the plaintiff participated in that negligence before you decide whether the defendant was negligent. You have got to first find whether

the defendant was negligent or not.

If you don't find the defendant was negligent, out, that is the end of the case. You don't go to the issue of contributory negligence, because you found that the defendant didn't do anything wrong. You only go to contributory negligence when you find that the defendant under the facts and the law was negligent.

Let's go on. Putting it another way, if you find that plaintiff's own negligence contributed to his injury, even in the slightest degree, you must find that plaintiff was contributorily negligent, even a little bit, one percent, five percent, two percent, ten percent, but he did something that is tantamount to negligence. And therefore why should he get complete recovery? That is what the law is trying to say to you.

So you understand that you do not go to contributory negligence before you find that the defendant was negligent. It is only if you find that the defendant's negligence brought about this accident and the injuries that flowed therefrom, then you ask yourselves did the plaintiff himself contribute to that accident, did his own behavior contribute to the total negligence that caused that accident to take place?

In determining whether the plaintiff contributed

to the accident you may consider whether what he was doing at the time was done in a normal and habitual way and whether he could have observed himself and could have avoided conditions which he alleges caused the accident.

The test that you are to apply is reasonably this: Whether he was doing what a reasonably prudent worker engaged in exactly what the plaintiff was doing at that particular time would not have been doing, or whether he omitted to do that which a reasonably prudent worker would have done at that time and under all those circumstances.

It might not be amiss if at this point we make reference to the tapping of the cable which the plaintiff conceded doing as he endeavored to get the cable wound around the drum of the tugger winch.

As I recall his testimony, remember, your recollection is paramount, Capt. De Graff stated under oath before you that tapping the cable was the almost invariable practice among the group, even though he regarded the practice an unsafe one.

Here I say to you emphatically, if what I say on this point or any other point does not accord with your recollection, just pay no attention to what I say, if it isn't in accord with your recollection of the testimony or the evidence. I make that overwhelmingly clear, I think,

backwards and forwards and inside out, but I am going to say it again.

My memory is that Capt. De Graff said that, that the men did do the tapping and he considered it an unsafe practice.

Now, if your recollection isn't that, then forget what I say on this point dealing with tapping. It is for you to say whether what plaintiff did in this respect was contributory negligence, and if so, to what extent.

Did his behavior in that regard contribute to the total happening of the total accident? You must, of course, ask yourselves whether this practice comes within the test of contributory negligence that I gave you.

Remember what I told you contributory negligence amounts to in contemplation of law. In determining whether the plaintiff contributed to the accident, you may consider whether what he was doing at the time was done in the normal and habitual way, and whether he could have observed and he himself could have easily avoided conditions which he alleges caused the accident.

The test which you are to apply then is whether he was doing what a reasonably prudent worker engaged in exactly what the plaintiff was doing at that particular time would not have been doing, or whether he omitted to do that

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which a reasonably prudent worker would have done at that time and under all those circumstances.

Moreover, a seaman does not assume any risk of injury which results from his use of a known unsafe appliance or method, although he had a free choice to avoid the use of it. Accordingly, if you find by reason of the particular winch then in operation that it was necessary for the plaintiff to tap the cable with his hand in order to more effectively wind it around the winch, then he cannot be held accountable for resorting to such a practice even though he knew it was unsafe to do so and that a safer practice might have been available.

Of course, in choosing to tap the cable with his hand the plaintiff was bound to act with a reasonable degree of caution and care and my memory is that there was no evidence saying that when he did the tapping, the method of his tapping was improper or wrong or abusive.

Accordingly, if you find that in tapping the cable with his hand the plaintiff failed to act with that degree of caution and care, then to that extent you may find him to have been contributorily negligent.

Now, the burden of proving that the plaintiff was contributorily negligent is on the defendant. The defendant must come forward and by a fair preponderance

of the credible testimony convince you that the plaintiff was contributorily negligent under all the circumstances then existing. And, if he doesn't, if the defendant doesn't meet that burden, then contributory negligence has not been established.

I told you yesterday, and I tell you again, it has been observed, and we should contmplate this in all matters that hindsight is the cheapest form of wisdom, and so it is not what a sober judgment could have after the event has taken place would indicate what the proper caution should have been. The question is whether or not this plaintiff exercised the proper care of a reasonably prudent employee at that particular time and under all the circumstances then existing.

I told you yesterday, I just told you again today that just because the plaintiff, if you should so find, was contributorily negligent that does not defeat his claim against the defendant. He has a right to have a recovery against the defendant . He has a right to have a recovery against the defendant minus the amount of the plaintiff's own contribution to that negligenc e, if you so find.

The law here is that if you should find that the plaintiff is contributorily negligent, you figure what percentage toward the total actual accident he contributed and how much the defendant contributed so that to give

you an example which is not an indication of how I feel at all, not indicating one way or another, if you find the plaintiff contributed to this accident to the extent of one-tenth, one-quarter or one-half, then the law says you deduct the extent of his negligence from what you would have awarded him if he had not contributed to the accident at all.

I don't know how much more simple I can make it. Then I told you further, and I repeat, a seaman is bound to follow the orders of his superiors on board a vessel. Moreover, a seaman is not contributorily negligent and he does not assume any risk of injury by obeying the orders of his superior or in accepting the working conditions and appliances provided for that purpose.

Accordingly, if you find that the plaintiff was assigned a task of operating the tugger winch on his own, then plaintiff was bound to accept that assignment and did not thereby assume any risk of injury in carrying it out, provided, of course, that in carrying out that assignment he proceeded with reasonable care and exercised caution under all the facts and circumstances then existing, and what could have been expected from the average normal worker undertaking that particular assignment.

In other words, the law always requires that a seaman

exercise reasonable care, as much as he can under the circumstances, in carrying out any assignment by his superior. Therefore, if you find that the plaintiff failed to exercise reasonable care in carrying out such assigned tasks, then plaintiff was contributorily negligent.

If, on the other hand, you find that the plaintiff in carrying out such assigned tasks did exercise reasonable care under all the circumstances, then the law says that he was not contributorily negligent.

I have said the same thought, I think, in fifteen different ways. Thank you, ladies and gentlemen. Go on with your deliberations.

MR. DANAHAR: If your Honor please, may I say something in the absence of the jury?

THE COURT: Sit down, sir.

All right, ladies and gentlemen of the jury.

[Jury leaves the courtroom]

[At the side bar]

MR. DANAHAR: If your Honor please, in your charge just now, and when you were speaking, as I observed --

THE COURT: What is your point? Make your point.

MR. DANAHAR: The point is that you made a statement to the jury that if the jury should find the defendant was not negligent the plaintiff is out of court, in substance,

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and there can be no recovery.

THE COURT: On negligence.

MR. DANAHAR: On negligence.

THE COURT: Certainly.

MR. DANAHAR: And you said nothing about unseaworthiness. That they could --

THE COURT: Bring back the jury. Get the jury back.

MR. COHEN: Your Honor, may I be heard on this?

THE COURT: Come on.

MR. COHEN: I have something I would like to place on the record, too.

First I would like to take an objection to your Honor's charging the jury that the plaintiff cannot be held accountable for tapping the winch cable even if he knew it was unsafe to do so. I object to that. Nobody told him he should tap it. That was not an order he was given.

In addition, your Honor, all the numerical examples you have given to the jury -- I want to take an exception to this charge.

THE COURT: You take an objection to the entire charge. You have already. And you have to the portion I reread today.

MR. COHEN: This specific part I want to call to

your Honor's attention now. I think I am obligated to.

THE COURT: What are you obligated to do? What?

MR. COHEN: To advise your Honor that I object to that specific part of the charge --

THE COURT: You have.

MR. COHEN: Now I have another point. In all your Honor's numerical illustrations you attached findings of one percent, two percent or five percent or ten percent contributory negligence. I would respectfully ask your Honor to charge the jury that they could also --

THE COURT: Didn't you hear me say fifty percent? And didn't you hear me say a hundred percent, in which event he couldn't recover?

All right.

[Jury enters the courtroom]

THE COURT: It has been expressed to me that there is apprehension that in the event you do not find that the defendant was negligent, that means that is the end of the case. I don't think that you failed to remember that I said that if you didn't find negligence you then go to unseaworthiness. You all know that, don't you? And you all knew that the doctrine of contributory negligence is to be applied in connection with unseaworthiness, didn't you know that, too?

Did any of you get the idea that I was suggesting to you what percentage the plaintiff was contributorily negligent? Did I not make it clear to you that I was giving you an example? And did I not make it clear when I said five, ten, fifteen, twenty-five, fifty percent, even if he did the whole thing you throw him out of court? Did I not make that clear? Didn't you understand it that way?

I am sorry, ladies and gentlemen, but you get a little bit worn down by some of these almost -- well, there is no use going any further.

All right, ladies and gentlemen, I am sorry.

[Jury leaves the courtroom]

THE COURT: Both of you come into the robing room, both lawyers. Get on your feet and come in.

[Court and counsel retire to the robing room]

[In open court - jury present]

THE CLERK: Members of the jury, please answer when you name is called.

Mrs. Burns.

MRS. BURNS: Here.

THE CLERK: Mrs. Brahms.

MRS. BRAHMS: Here.

THE CLERK: Mr. Berman.

MR. BERMAN: Yes, sir.

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THE CLERK: Mr. Perillo.

MR. PERILLO: Here.

THE CLERK: Mrs. Christiansen.

MRS. CHRISTIANSEN: Here.

THE CLERK: Mr. Wilkinson.

MR. WILKINSON: Here.

THE COURT: We just have to have the record show that you all responded and you are actually here and that you were the ones who responded.

Now, Mr. Clerk, show this paper marked Court's Exhibit No.4 to the forelady, and all I want you to do is just answer the question I ask.

Is that not the paper you sent in to me just about ten or fifteen minutes ago?

THE FORELADY: Yes, sir.

THE COURT: And is that the verdict of the jury?

THE FORELADY: Yes, sir.

THE COURT: All right. Now, would you hand it back to the Clerk.

THE FORELADY: Yes, sir.

THE COURT: Let me have it, Mr. Clerk.

Now, Mrs. Burns, according to this did the jury find the defendant negligent?

THE FORELADY: Yes, sir.

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THE COURT: Did the jury find the plaintiff contributorily negligent?

THE FORELADY: Yes, sir.

THE COURT: To what extent did the jury find the plaintiff contributorily negligent?

THE FORELADY: Fifty percent.

THE COURT: Fifty percent?

THE FORELADY: Yes, sir.

THE COURT: Now, the verdict then is in favor of the plaintiff or the defendant?

THE FORELADY: Plaintiff.

THE COURT: Now the amount of the verdict, is that after you have taken off the contributory negligence?

THE FORELADY: Yes, sir.

THE COURT: Is it?

THE FORELADY: Yes, sir.

THE COURT: Please state it.

THE FORELADY: Yes, sir.

THE COURT: Yes. So that the amount of the verdict reflects the total verdict of the jury after the jury took off the fifty percent of the contributory negligence by the plaintiff.

THE FORELADY: Yes, sir.

THE COURT: So that the original -- if the plaintiff

had not contributed, the amount of the verdict would have been twice the amount reflected on Court's Exhibit No.4; is that right?

THE FORELADY: Yes, sir.

THE COURT: Let me have the list, please, Mr. Clerk. Mrs. Brahms, did you hear what I was asking the forelady?

MRS. BRAHMS: Yes, sir.

THE COURT: And her responses, are they in accord with your vote as one of the jurors?

MRS. BRAHMS: Yes, sir.

THE COURT: In every respect?

MRS. BRAHMS: Yes, sir.

THE COURT: Mr. Berman, did you hear everything that I asked of the forelady?

MR. BERMAN: Yes, sir.

THE COURT: And would you say that her responses to everything I asked are in accordance with your vote on those questions in this case?

MR. BERMAN: Yes, sir.

THE COURT: Now we come to Mr. Perillo. Mr. Perillo, did you hear everything that I asked the forelady and her responses?

MR. PERILLO: I did, your Honor.

THE COURT: And would you say, sir, that what she said in answer to those questions reflects your own vote on each one of those issues?

MR. PERILLO: It does, your Honor.

THE COURT: Thank you.

Mrs. Christiansen, did you hear and understand what I asked the forelady?

MRS. CHRISTIANSEN: Yes, your Honor.

THE COURT: And did you hear her responses?

MRS. CHRISTIANSEN: Yes, your Honor.

THE COURT: Do her responses accord with what you would like to have recorded as your vote as a juror, one of the jurors in this case?

MRS. CHRISTIANSEN: Yes, your Honor.

THE COURT: Mr. Wilkinson, did you hear and understand the questions I put to the forelady?

MR. WINKINSON: Yes, your Honor.

THE COURT: And did you hear her responses?

MR. WINKINSON: Yes, your Honor.

THE COURT: Did her responses reflect your vote as one of the jurors in this case?

MR. WILKINSON: Yes, your Honor.

THE COURT: In every particular?

MR. WILKINSON: Yes, sir.

THE COURT: So that I take it that unless any of you tell me to the contrary you are saying to me, in effect, Judge, we found the defendant negligent, we found that the plaintiff contributed thereto, and that the extent of the plaintiff's contribution to that negligence was fifty percent, that our verdict would have been $500,000 if the plaintiff had not contributed to the negligence, but because he did contribute to the negligence to the extent of fifty percent we give him a verdict of $250,000.

Is that what you want the record to show, Madam Forelady?

THE FORELADY: Yes, sir.

THE COURT: Is that what you want, Mrs. Brahms, to reflect?

MRS. BRAHMS: Yes, sir.

THE COURT: Is that your verdict, Mr. Berman?

MR. BERMAN: Yes, sir.

THE COURT: Is that your verdict, Mr. Perillo?

MR. PERILLO: Yes, sir, your Honor.

THE COURT: Is that your verdict, Mrs. Christiansen?

MRS. CHRISTIANSEN: Yes, your Honor.

THE COURT: Is that your verdict, Mr. Wilkinson?

MR. WILKINSON: Yes, your Honor.

THE COURT: All right. Mr. Clerk, you may finish

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what you have to do. As I remember it there is nothing further to do.

THE CLERK: Nothing further, your Honor.

THE COURT: All right, the Clerk is directed to file of record Court's Exhibit No.4.

xx [Court's Exhibit No. received in Evidence]

THE COURT: Now, just one or two minutes more and then I will let you go.

Mrs. Burns, Madam Forelady, members of this jury, no matter what your verdict would have been, if, for example, you had found no fault by the defendant and returned that as your verdict, I would say to you what I am about to say. Your verdict was your business. There are those who will disagree with you. They have got a perfect right to disagree, but yours was the responsibility.

I watched you, as I do the jury in every case, because it wasn't just a figure of speech when I said to you, as I have said to jurors, that justice rides with the jury. I knew that you would have to have everything laid out clearly before you in order to pick and choose and make up your minds where justice in the case lay according to the evidence and according to the law.

You went about your mission with the finest spirit. I saw you hanging on every word. You worried. I saw your

furrowed foreheads. I saw you leaning forward to catch every word. I saw your display of anxiety as to whether you clearly understood what had just been imparted to you.

Nothing more can be expected of mortals. God was there at the time. You weren't. Neither was I. There was a flashback that you had to engage in. You took these pieces and you fitted them into a mosaic, and that was not an easy job to do.

I could almost feel the weight of your perturbation. You wanted to do the right thing, and I spent a lot of time saluting you for it because without that there is no --without that there is no justice. Too many are just looking for a hunk of something. They want a cut. They want this, and they want that. They don't know the language I am talking to you about and the language that you understand, because it's the spirit that you brought to your mission that accounts for the justice that was rendered here.

You didn't go in there and toss a coin. You didn't just add up numbers and divide by six. You went in there and you were worried. You wanted to do a good job as Mrs. Davis expressed before she was even sworn. Her anxiety was whether she could really cope with the challenge.

Forgive me if I spend time hailing that and saluting you, because without that there is no justice.

We can do all the figuring and all the adding and all the weighing we want. That is not enough. You have got to cement it with a spirit of caring. Enough to disturb yourselves. And that is what you did, and I thank you.

You are excused from further deliberations and, Mr. Clerk, I would suggest that they be spared any further jury duty, if that can be arranged.

THE CLERK: Those who wish to serve may serve further, your Honor, but I have given a certificate of discharge. Those who wish to serve can serve further.

THE COURT: Did you hear what he said? Those who wish to serve may serve, and those who do not wish to serve, you have a certificate of discharge from further service. Is that clear?

All right, thank you. Thank you each one.

[Jury discharged]

THE COURT: Mr. Cohen, do you have any motions?

MR. COHEN: If I may, I will reserve any motions to written papers, your Honor.

THE COURT: Very well. Under the rules of the court you have that right and act within the time allowed by the rules to make any motions that you think are called for.

Is there anything that the plaintiff's lawyer wishes to say?

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MR. DAMAR: I will reserve any motions also, your Honor.

THE COURT: Very well. So ordered. That is it.

[Time noted: 4:00 p.m.]

* * * *

WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
Michael T. Anderson	33	131		
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Joseph G. Rankin	605	606	610	
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William Wheeler	630	646		
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2-C		61
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4		531
5A		696
6		696
7		697
8		697
9	700	
10		719
11	734	

JUDGEMENT A994a

FEB 26 [illegible]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

MICHAEL T. ANDERSON,

Plaintiff,

-against-

GREAT LAKES DREDGE & DOCK CO.,

Defendant.

- X

71 Civil 2910(IBC)

JUDGMENT

74,222

The issues in the above entitled action having been brought on regularly for trial before the Honorable Irving Ben Cooper, United States District Judge, and a jury on February 11, 12, 13, 14, 19 and 20, 1974, and the Court having submitted the attached special verdict to the jury, and the jury having answered the special verdict as indicated thereon, and the jury having returned the special verdict in favor of the plaintiff in the amount of $500,000., and the jury having further found that the plaintiff contributed to the negligence to the degree of 50%, thereby reducing the amount of the award to $250,000., it is,

ORDERED, ADJUDGED AND DECREED, that plaintiff, MICHAEL T. ANDERSON, have judgment against the defendant, GREAT LAKES DREDGE & DOCK CO., in the amount of $250,000.00.

Dated: New York, N. Y.
February 21, 1974

Raymond F. Burghardt 2/28/74
Clerk

APPROVED:

United States District Judge.

DECISION OF THE COURT BELOW

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- X

MICHAEL T. ANDERSON,

Plaintiff, 71 Civil 2910

-against-

GREAT LAKES DREDGE & DOCK CO.,

Defendant.

- X

Defendant has moved pursuant to Fed. R. Civ. P. 50(b) and 59 for judgment notwithstanding the verdict and in the alternative for a new trial. Numerous grounds have been se forth in support of the motions alleging that the verdict was excessive and contrary to the evidence and that errors of law prejudicial to defendant were committed during the course of the trial.

After careful review of the entire record, we conclude that the grounds raised are without merit. As we see it, it is incumbent upon the Court to insist that factual uncertainties and factual omissions of a serious nature be clarified for the jury's edification and the full protection of the litigant regardless of the additional burden this necessarily imposes on the Court. To accomplish such a goal, we were compelled to participate to an unusual degree which was neither solicite

A996

nor desired.

Accordingly, defendant's motions are denied in all respects.

SO ORDERED:

IRVING BEN COOPER

U. S. D. J.

New York, N. Y.
April 30, 1974.

9451:JAC:ML

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A997

MICHAEL T. ANDERSON,

Plaintiff,

-against-

GREAT LAKES DREDGE & DOCK CO.,

Defendant.

NOTICE OF APPEAL

71 Civil 2910

(IBC)

S I R S :

PLEASE TAKE NOTICE that the defendant, GREAT LAKES DREDGE & DOCK CO., does hereby appeal to the United States Court of Appeals for the Second Circuit from the final judgment of this Court (#74,222) entered herein on February 26, 1974 in favor of the plaintiff and against the defendant, GREAT LAKES DREDGE & DOCK CO., in the amount of $250,000, and appeals from each and every part of said judgment as well as from the whole thereof.

PLEASE TAKE FURTHER NOTICE, that upon said appeal defendant will bring up for review an order of this Court entered April 30, 1974 denying the post-trial motions of the defendant for judgment notwithstanding the verdict and, inthe alternative, for a new trial.

DATED: New York, N. Y.,
May 28, 1974

A Member of the Firm
of
ALEXANDER, ASH, SCHWARTZ & COHEN
Attorneys for Defendant
801 Second Avenue
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TO:

JOHN J. CORCORAN, ESQ.,
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Copy Received
Aug. 13, 1974
John J. Corcoran